90-792

Supreme Court, U.S.
FILED
NOV 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

LESLIE SALT CO. and CARGILL, INC.
Petitioners,

VS.

UNITED STATES, et al.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LOUIS F. CLAIBORNE*
EDGAR B. WASHBURN
WASHBURN, BRISCOE & MCCARTHY
A Professional Corporation
144 Second Street
San Francisco, CA 94105
Telephone: (415) 543-8131
Attorneys for Petitioners

* Counsel of Record

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

81

QUESTION PRESENTED

Whether the Clean Water Act reaches temporarily wet areas whose "waters" (a few inches of rainwater ponding only days or weeks during the winter season) are neither navigable nor adjacent to, or connected with, any navigable waterbody, and whose claimed link with interstate commerce is solely the presence of migratory birds or endangered species.

PARTIES BELOW

In addition to the parties named in the caption, defendants in the District Court and appellants in the Court of Appeals included the then Secretary of the Army (John O. Marsh), Chief of Engineers (Lt. Gen. E.R. Heiberg), and District Engineer for the San Francisco District of the Corps of Engineers (Lt. Col. Andrew M. Perkins), all sued in their official capacity. Intervenors in the District Court and appellants in the Court of Appeals were The Save San Francisco Bay Association, a non-profit California corporation, and National Audubon Society, a non-profit New York corporation.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Statutory and Regulatory Provisions Involved	2
Statement	2
Reasons For Granting The Writ	7
A. The Question Presented is of Recurring Importance	7
B. The Decision Below is Plainly Erroneous	11
C. The Issue is Ripe for Resolution by the Court	22
Conclusion	23
Appendices	A-1
A. Opinions of the Court of Appeals	A-1
B. Opinion of the District Court	A-15
C. Order Denying Rehearing	A-42
D. Statutory and Regulatory Provisions	A-44
E. Corps of Engineers Memorandum of Jan. 24, 1990, and attached Joint Memorandum of EPA and Corps of Engineers	A-46

TABLE OF AUTHORITIES

Cases

	Page
Andrus v. Sierra Club, 442 U.S. 347 (1979)	20
Bowen v. American Hospital Ass'n, 476 U.S. 610 (1986)	18
Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988)	18
Chemehuevi Tribe of Indians v. Federal Power Commission, 420 U.S. 395, (1975)	15
Chevron USA v. NRDC, 467 U.S. 837 (1984)	18
Dole v. United Steelworkers of America, 108 L.Ed.2d 23 (1990)	18
Economy Light & Power Co. v. United States, 256 U.S. 113 (1921)	15
ETSI Pipeline Project v. Missouri, 484 U.S. 495 (1988)	18
Federal Power Commission v. Union Electric Co., 381 U.S. 90 (1965)	13, 14
Gillespie v. United States Steel Corp., 379 U.S. 148 (1964)	23
Immigration & Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421 (1987)	18
Kaiser Aetna v. United States, 444 U.S. 164 (1979)	14
Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir. 1978)	16
North Dakota v. United States, 460 U.S. 300 (1983)	11, 17
NRDC v. Callaway, 392 F.Supp. 685 (D.D.C. 1975)	19
Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941)	16
Polish National Alliance v. NLRB, 322 U.S. 643 (1944)	14
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974)	22
Riverside Irrigation District v. Andrews, 758 F.2d 508 (10th Cir. 1985)	12
Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989)	20
Sullivan v. Zebley, 107 L.Ed. 2d 967 (1990)	18

TABLE OF AUTHORITIES

Page

Tabb Lakes, Ltd. v. United States, 715 F.Supp. 726 (E.D. Va. 1988), aff'd, 885 F.2d 866, 20 ELR 20008 (4th Cir. 1989) 18, 20, 21, 22

United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940) 15

United States v. Cherokee Nation of Okla., 480 U.S. 700 (1987) 14

United States v. General Motors Corp., 323 U.S. 373 (1945) 23

United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950) 14

United States v. Larkins, 852 F.2d 189 (1988) 22

United States v. Leslie Salt Co., 350 U.S. 383 (1956) 18

United States v. Lexington Mill & E. Co., 232 U.S. 399 (1914) 14

United States v. Mendoza, 464 U.S. 154 (1984) 21

United States v. Rands, 389 U.S. 121 (1967) 14

United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899) 15

United States v. Riverside Bayview Homes Inc., 474 U.S. 121 (1985) ..... *passim*

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 22

U.S. Constitution

Commerce Clause
Art. I, § 8, cl. 3 ..... 16, 17

Just Compensation Clause
Amend. V 14, 23

Statutes

Act of June 29, 1888
§ 1, 33 U.S.C. § 441 15

Act of Feb. 19, 1895
§ 2, 33 U.S.C. § 151 13

Act of Sept. 15, 1922
33 U.S.C. § 472 13

TABLE OF AUTHORITIES

Page

Act of June 22, 1936
§ 1, 33 U.S.C. § 701(a) 13
Administrative Procedure Act
5 U.S.C. § 553 20
5 U.S.C. § 553(b)(3)(A) 20
Bear River Migratory Bird Refuge Act
16 U.S.C. § 690 et seq. 11
Cheyenne Bottoms Migratory Bird Refuge Act
16 U.S.C. § 691 et seq. 11
Clean Water Act
33 U.S.C. § 1251 et seq. ..... *passim*
§ 301(a), 33 U.S.C. § 1311(a) 2
§ 404(a), 33 U.S.C. § 1344(a) 2, 13
§ 404(b), (c) & (e), 33 U.S.C. § 1344(b), (c) & (e) .. 11
§ 502(7), 33 U.S.C. § 1362(7) 2, 13
§ 502(12), 33 U.S.C. § 1362(12) 2
Emergency Wetlands Resources Act of 1986
16 U.S.C. § 3901 et seq. 11
Endangered Species Act of 1973
16 U.S.C. § 1531 et seq. 11
Federal Power Act
§ 23(b), 16 U.S.C. § 817 14
Migratory Bird Conservation Act
16 U.S.C. § 715 et seq. 11
Migratory Bird Hunting Stamp Act
16 U.S.C. § 718 et seq. 11
Migratory Bird Hunting Stamp Act Amendments of 1958
16 U.S.C. § 718d(b) & (c) 11
Migratory Bird Treaty Act
16 U.S.C. § 703 et seq. 11
Migratory Waterfowl and Other Wildlife Refuge in California Act
16 U.S.C. § 695 et seq. 11
Public Law 85-500
§ 104, 33 U.S.C. § 610 15
Rivers and Harbors Act of 1894
§ 5, 33 U.S.C. § 499 13

TABLE OF AUTHORITIES

Page

Rivers and Harbors Act of 1899
§ 10, 33 U.S.C. § 403 ..... 2, 4, 13
§ 13, 33 U.S.C. § 407 15
Tucker Act
28 U.S.C. § 1491 ..... 10, 15, 22
Wetlands Act of 1961
16 U.S.C. § 715k-3 11
Wetlands Loan Extension Act
16 U.S.C. § 715k-3 11

Regulations

Corps of Engineers Regulations (1975)
40 Fed.Reg. 31320 et seq. 19
Corps of Engineers Regulations (1986)
33 C.F.R. § 320.4(a) 11
§ 320.4(b)(2)(i) 11
§ 320.4(b)(6)(j)(4) 11
§ 328(a)(3) 2, 3
§ 328.3(a)(1) & (6) 2
§ 328.3(a)(2) 2
§ 328.3(a)(3) 8, 20
§ 328.3(a)(5) 2
§ 328.3(a)(7) 2
§ 330.5(b)(3) 11
Environmental Protection Agency Guidelines
40 C.F.R. § 230.10(a) 10
§ 230.10(a)(3) 10
§ 230.10(c) 10
§ 230.30 11
§ 230.30(s)(3) 20
§ 230.32 11
§§ 230.40-230.45 10

TABLE OF AUTHORITIES

Miscellaneous

Page

118 Cong. Rec. 33699 (statement of Senator Muskie) . . . 15, 16

118 Cong. Rec. 33756-33757 (statement of Rep. Dingell) . . 15

Development of New Regulations by the Corps of Engineers, Implementing section 404 of the Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation, 94th Cong., 1st Sess. (1975) 19

Frayer, et al., *Status and Trends of Wetlands and Deepwater Habitats in the Conterminous United States, 1950's to 1970's* (Apr. 1983) 8

National Wetlands Policy Forum, *Protecting America's Wetlands: An Action Agenda* (1988) 12

Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works, 99th Cong., 1st Sess. (1985) 17, 19

Senate Conference Report 1236, 92nd Cong., 2d Sess. 144 (1972) 16

Supplementary Information, Corps of Engineers Final Rulemaking (1986) 51 Federal Register 41217 . . . . . 3, 20

U.S. Congress Office of Technology Assessment, *Wetlands, Their Use and Regulation* (1984) 12

U.S. Fish & Wildlife Service, *Wetlands of the United States: Current Status and Recent Trends* (Mar. 1984) 8, 9

17 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4036 (2d ed. 1988) 23

No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

LESLIE SALT CO. and CARGILL, INC.
Petitioners,

vs.

UNITED STATES, et al.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Leslie Salt Co. and Cargill, Inc., both Delaware Corporations, petition this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, together with the dissenting opinion of Judge Rymer, is reported at 896 F.2d 354, and is reprinted in the Appendix hereto, pp. A-1 to A-14.

The opinion of the District Court is reported at 700 F.Supp. 476, and is reprinted in the Appendix hereto, pp. A-15 to A-41.

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 1990. A timely petition for rehearing was denied on August 27, 1990 (App. A-42 to A-43, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Clean Water Act and of the implementing Regulations issued by the U.S. Army Corps of Engineers are reproduced in the Appendix hereto, pp. A-44 to A-45.

STATEMENT

1. The case arises under the Clean Water Act, enacted in 1972 and amended in 1977. 33 U.S.C. § 1251 *et seq.*[1] So far as relevant to this petition, that statute prohibits the discharge of any "pollutant" (including dredged or fill material) into "navigable waters," except in compliance with a permit issued under the Act. § 301(a), 33 U.S.C. § 1311(a); § 502(12), 33 U.S.C. § 1362(12). Responsibility for granting or denying such permits "for the discharge of dredged or fill material into the navigable waters" is assigned to the Secretary of the Army—effectively, the Corps of Engineers. § 404(a), 33 U.S.C. § 1344(a). And, finally, "navigable waters" is later defined as "the waters of the United States, including the territorial seas." § 502(7), 33 U.S.C. § 1362(7).

In turn, the Corps of Engineers has promulgated implementing regulations which, among other things, purport to delimit the agency's geographic jurisdiction by listing the several categories of aquatic and partially aquatic features that comprise the covered "waters of the United States." 33 C.F.R. Part 328. The only such provision that concerns us here is the inclusion of "other waters," 33 C.F.R. § 328.3(a)(3)—that is, all waters and wetlands that are not part of navigable interstate waterways or tidal waters (§ 328.3(a)(1) & (6)), do not themselves cross state lines (§ 328.3(a)(2)), and are not tributaries of such waters (§ 328.3(a)(5)), or adjacent wetlands (§ 328.3(a)(7)). In short, what is involved are so-called "isolated" waters wholly uncon-

---

[1] The claim under Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, has apparently fallen away. See p. 6, *infra*.

nected to any past, present or potential artery of interstate commerce and lying entirely within one state.

Under the regulation, "other waters" are covered only if their "use, degradation or destruction could affect interstate or foreign commerce." Three examples of such potential "effects" are given: use by interstate travellers for recreational or other purposes; production of fish or shellfish destined for interstate markets; or use by industries in interstate commerce. 33 C.F.R. § 328(a)(3). There is, however, no suggestion that the litigation site has any such link to "commerce," the only predicate for jurisdiction over the acreage still in dispute being its character as habitat for migratory birds or endangered species. As explained in a moment, this basis for coverage has never been incorporated in any regulation. It appears simply in the published preface to the 1986 regulations. See 51 Fed.Reg. 41217 (1986).

2. The litigation site is a 153-acre tract of undeveloped land southeast of San Francisco, once pasture land, whose condition has been somewhat altered, first by the owners to accommodate salt-making, and, more recently, by the acts of state and federal agencies, building roads, a large sewer, and culverts, breaching a levee on the adjacent wildlife refuge, and destroying a tidegate. App. A-2 to A-3, *infra*. One of the new roads has severed the property into two parcels, one of 143 acres, the other holding 10 acres. *Id.* at A-2. We are not here concerned with the southern "corners" or "tips" of the two parcels—comprising less than 9 acres together[2]—which have been determined to be "adjacent wetlands." See *id.* at A-4, A-6 to A-8. In this Court, we challenge only the ruling below as it affects some 100 acres in Parcel 143,[3]

---

[2] The acres in question are depicted on Exhibit 159, pp. 54 (areas 3 and 4) and 57 (area P), explained at pp. 52-58. The wetland "corners" comprise approximately 6.6 acres of Parcel 10 and some 2.1 acres of Parcel 143. Exh. 159, pp. 55, 58.

[3] The Corps' claim of jurisdiction extended to 110 acres. E.R. 8. Subtracting the 9 acres of "corners," not challenged in this Court, some 101 acres remain. There is no assertion of jurisdiction over the balance of Parcel 10, so that the 100 acres still in dispute are all within the larger Parcel 143. See E.R. 14.

consisting of former crystallizers and calcium chloride pits once used in the salt manufacture process. See *id.* at A-5, A-8.

It is long since admitted that no part of this 100-acre tract qualifies as "wetlands," adjacent or otherwise, and it is common ground that the only water reaching this tract is rainwater, which creates temporary "ponds" entirely unconnected to any other waterbody—much less any navigable waterway. See *id.* at A-6 n.6, A-8 to A-9, A-11 to A-12. The question presented is whether these seasonally or "ephemerally" ponded acres[4]—"isolated" though they be—are nevertheless subject to regulation by the U.S. Army Corps of Engineers under the Clean Water Act as "waters of the United States." This is the issue reserved by this Court in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 124 n.2, 131 n.8 (1985). Here—as typically will be the case with respect to isolated waters or wetlands—the sole basis for embracing the site was the theory that its "degradation or destruction . . . could affect interstate or foreign commerce" because of the presence of migratory birds or endangered species. See App. A-11 to A-12, *infra*.

3. After a lengthy trial on cross-suits filed by the parties, the District Court held the Corps of Engineers without jurisdiction over any part of the property, whether under Section 404 of the Clean Water Act, or Section 10 of the Rivers and Harbors Act. App. A-41, *infra*. In dealing with the approximately 100 acre crystallizer and pit area still in dispute, the Court considered at

---

We note that the claim of jurisdiction premised on alleged "tidal" effect, limited to 5 acres in the same "corners" determined to constitute adjacent wetlands (see E.R. 9), is mooted by our acquiescence in the wetlands ruling. See App. A-4 to A-5 n.5, *infra*.

[4] Although the court below speaks only of "seasonal" ponding, App. A-11, *infra*, the Corps asserted jurisdiction over a much more expansive area of the crystallizers which the Government itself described as subject only to "ephemeral" ponding. According to the Government's expert witness, some 14 acres, at most, were seasonally ponded (Tr. 1060-1062), and the remaining crystallizer acreage—some 85 acres—were said to suffer no more than "ephemeral ponding," a standard satisfied by a few inches of water in the bottom of plowed furrows standing for a "matter of hours" after a rainfall. Tr. 1091-1092.

length, and rejected on a variety of grounds, the Government's then primary wetland claim. *Id.* at A-33 to A-40. The Court also concluded that these acres could not qualify as "other waters"—as distinguished from wetlands—because the crystallizers and calcium chloride pits were artificially created and thus did not satisfy the standard set by the Corps' own regulations. *Id.* at A-32 to A-33. And, as the Court of Appeals acknowledged, *id.* at A-9, A-11, the District Court independently rejected the "other waters" claim for at least most of the site on the ground that "land does not become a water of the United States just because water collects, ponds, and stands on land for a few days after a rain." *Id.* at A-29. See also *id.* at A-35.[5] Given these holdings, the Court found it unnecessary to address the question presented here. *Id.* at A-30 to A-32.

4. The United States appealed, but abandoned its wetland claim except as to the nine acres of "corners." See App. A-6 n.6, *infra*. Over a partial dissent (*id.* at A-13), a majority of the Court of Appeals panel reversed in all respects. As previously noted, we do not now present any issue with respect to the parcel "corners" and accordingly need not describe the rulings confined to those 9 acres. See *id.* at A-6 to A-8. As to the balance of the property, the appellate court faulted the District Court for reading the Corps' regulations as not reaching the crystallizers and calcium chloride pits on account of their "artificial" origin, *id.* at A-9 to A-11, and likewise reversed the trial court's conclusion that the temporary ponding was insufficient to qualify these acres as covered "waters." *Id.* at A-11.[6]

---

[5] Elsewhere in its opinion, the District Court described the crystallizers as "remain[ing] dry, except when rainwater accumulates during the winter" (App. A-22, *infra*), ponding only "temporarily" (*ibid.*), "in fact dry most of the year" (*id.* at A-32), "'inundated' only during and for a short time immediately after winter rains" (*id.* at A-34), and as an area where "rain water collect[s] . . . for a few days" (*id.* at A-35).

[6] It is worth noting that the Court of Appeals' reference to "standing water . . . remaining long enough for fish to live in the ponds" (App. A-2 to A-3) is misleading. See Dissent at App. A-13, *infra*. Small stickleback were spotted in a ditch that surrounds the northern calcium chloride pit and dried remains of such fish were found nearby. Tr. 677-

The Court of Appeals dealt with the issue now tendered to this Court in a few words. Without discussion—or acknowledging the reservation of the question in *Riverside*—the Court declared that the Clean Water Act embraces "any aquatic features within the reach of the commerce clause power" (App. A-6, *infra*), and that, accordingly, "the Corps' jurisdiction [extends] to local waters which may provide habitat to migratory birds and endangered species" (*id.* at A-12). The Court then remanded the case for "a factual determination of the sufficiency of the property's connections to interstate commerce." *Ibid.* But, in light of the Court's legal ruling and the state of the record, that is a mere formality. We do not deny that some part of the site satisfies the Court's standard;[7] our submission is simply that the Clean Water Act does not authorize the Corps to regulate on any such theory.

Although the Government had appealed the rejection of the Rivers and Harbors Act claim, the Court of Appeals does not discuss the point—beyond noting that such a claim was originally advanced by the Corps. App. A-4, *infra*. Presumably, in this one respect, the appeal failed.

Circuit Judge Rymer dissented as to the larger area of the crystallizers and calcium chloride pits. App. A-13, *infra*. She stressed that seasonal ponding there "creates no hydrological connection with any other body of water," and that "there is nothing in the record to show that water flows directly or indirectly from the crystallizers or pits into another body of water." *Ibid.* On that basis, Judge Rymer concluded that these areas were not embraced by the Corps' regulations and found it unnecessary to reach the issue reserved by this Court in *Riverside* and

---

678, 1181-1183. But, given the prevalence of this hearty species in freshwater, these very limited sightings do not remotely imply a connection of the site with San Francisco Bay or suggest a generally ponded status for most of the crystallizer area.

[7] To be sure, if this Court were to decline review, we would be free on remand to litigate *how much* of the property is "other waters" frequented by migratory birds or endangered species.

presented here. *Ibid.*[8] Nevertheless, the Judge articulated substantial doubts concerning the propriety of extending jurisdiction on the basis of migratory bird use. *Id.* at A-13 to A-14 n.1.

REASONS FOR GRANTING THE WRIT

A. The Question Presented Is Of Recurring Importance

In this Court, we are concerned with the jurisdiction asserted by the Corps of Engineers under the Clean Water Act over temporarily wet areas whose "waters"—a few inches of ponded rainwater which accumulates only during the winter rainy season —concededly are not adjacent to or connected with any navigable waterbody. Although broader questions involving all "isolated" waters, or all non-navigable "isolated" waters, are implicated, we focus on the present situation in which the waters are not only isolated, but also undeniably non-navigable, and the sole premise for coverage is the actual or possible use of the site as habitat by migratory birds or endangered species. And, finally, while noting the conflict of decisions with respect to the procedural flaw in the promulgation of the relevant "regulation," we press the substantive issue whether, in the Clean Water Act, Congress intended to regulate (or to authorize federal agencies to regulate) land of the character involved here on any such unconventional theory. This is the question pointedly left unresolved by this Court in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 124 n. 2, 131 n. 8 (1985).[9]

---

[8] On its face, Judge Rymer's opinion would seem to require reaching the issue left open in *Riverside*, since the point of the "other waters" regulation is to embrace isolated waters having no connection to navigable interstate waterways. Perhaps the dissent should be read as sharing the District Court's view that the *degree* and *duration* of wetness of the site is inadequate to qualify it as "other waters," in the first place.

[9] The Court was there referring to one species of "other waters," so called "isolated *wetlands*", whereas here the Government has now abandoned the claim that the areas in question are wetlands, asserting instead that they are isolated "other waters" of unspecified character. The same regulation is implicated and the issue with respect to isolated wetlands typically presents the same ingredients as our case, a non-

1. The ruling we complain of has very far-reaching consequences. Narrowly defined as it seems, the question presented affects by far the largest part of the Corps' claimed jurisdiction under the "isolated" waters regulation. Indeed, there are relatively few navigable intrastate waterbodies that are entirely unconnected with an interstate waterway, and presumably there are not many wholly intrastate waters which, although non-navigable, are used by interstate travellers or interstate industries or produce fish or shellfish destined for interstate markets. See 33 C.F.R. § 328.3(a)(3). Our setting, on the other hand, is all too common.

Statistics are hardly necessary to demonstrate the prevalence of sometimes wet sites that attract migratory birds, albeit they are wholly unconnected with any navigable waterway and are not themselves remotely navigable. The relevant birds, we should stress, are not necessarily *water birds*; as was the case here for much of the property, they may be common upland birds, such as blackbirds, who come to drink or simply to rest. It is safe to say that embracing such areas within the Clean Water Act subjects several tens of millions of additional acres to regulation by the Corps of Engineers and at least potentially withdraws that quantity of land from development.[10]

---

navigable site whose only claimed link with interstate commerce is the sometime presence of migratory birds.

[10] For present purposes, we assume that some part of the property in question qualifies as an "aquatic" site within the Corps' "other waters" regulation, even though it is no longer claimed that the crystallizers and calcium chloride pits are wetlands. But the typical case presenting the question we tender here presumably will involve isolated wetlands. It has been estimated that there are some 90 millon acres of "palustrine" freshwater wetlands within the continental United States, not including Alaska. See, Frayer, et al., *Status and Trends of Wetlands and Deepwater Habitats in the Conterminous United States, 1950's to 1970's*, 3, 20-21, 22-23 (Apr. 1983); U.S. Fish & Wildlife Service, *Wetlands of the United States: Current Status and Recent Trends* vii, 5, 9, 28, 29 (Mar. 1984). Unlike "marine", "estuarine," "lacustrine" and "riverine" wetlands, palustrine wetlands are not typically associated with any "deepwater habitat." Frayer, *supra*, at 12-13; USFWS, *Current Status*, etc., *supra*, at 9-11. Thus, a large part of the 90 million acres is isolated from any navigable waterway. To these wetland acres in the lower 48 must be

2. What is more, once the statute is held to authorize regulation of non-navigable isolated sites, it is very difficult to hold the agencies to any strict line distinguishing between land and water. This case illustrates the point, involving as it does an assertion of jurisdiction over areas no longer claimed to qualify as wetlands, albeit wetlands are supposedly the driest of the spectrum of "waters of the United States." For the most part, the land in dispute is only subject to what is described by the Government itself as "ephemeral ponding," a standard satisfied by the presence of standing rainwater a few inches deep in the bottom of the furrows of a plowed field for no more than a few hours at a time. Obviously enough, such over-zealous implementation of the "isolated" waters provision may escape judicial review, given the difficulty of faulting an agency's reading of its own regulations and the expenses and delays incurred in even successful litigation. Thus, an extension of jurisdiction like that seen here may well become the norm if the decision below remains undisturbed. In that event, the geographical scope of the Clean Water Act suddenly will have been expanded to embrace several times the acreage regulated for the first dozen years after its passage—all without any relevant amendment of the statute.

Of course, the Court ought not be asked to decide whether this result is or is not desirable. Our submission is simply that Executive Department agencies cannot be left free to accomplish such a radical transformation of private property into public land —with substantial potential exposure to the national treasury as a result of "takings" claims—unless Congress itself has chosen that course, or at least has authorized the administrators to embark upon it. We ask this Court's intervention to end the progressive expansion of a regulatory program that proceeds on the very unlikely premise that, without remotely saying so, Congress granted the implementing agencies uncabined discretion to ex-

---

added substantial areas of isolated wetlands in Alaska (presumably an important share of Alaska's estimated total of 200 million acres, USFWS, *Current Status*, etc., *supra*, at 28), and some in Hawaii, as well as isolated non-navigable "rivers, streams, . . . mudflats, sandflats, . . . sloughs, prairie potholes, [and] wet meadows" elsewhere that do not constitute wetlands but attract migratory birds or endangered species.

tend their jurisdiction as far as evolving constitutional doctrine would authorize Congress itself to reach. But see n.20, *infra*.

3. In the present context, it should be stressed, the prospects of obtaining a permit under Section 404 are virtually nil. Indeed, the EPA Guidelines that presumably would be invoked foreclose discharges into covered waters if there is a "practicable alternative" (40 C.F.R. § 230.10(a)), and the existence of such an alternative is "presumed to be available, unless clearly demonstrated otherwise," where a "special aquatic site" (see 40 C.F.R. §§ 230.40-230.45) is involved and the development project is not "water dependent." 40 C.F.R. § 230.10(a)(3). In practice, these rules, together with other Guidelines (see, *e.g.*, 40 C.F.R. § 230.10(c)), predictably will defeat any permit application with respect to lands like those in suit.

It may be said that petitioner and like-situated landowners have an adequate remedy under the Tucker Act (28 U.S.C. § 1491)—as the court below suggested. App. A-7 to A-8, *infra*. To be sure, the availability of just compensation for a "taking" obviates any claim that the Clean Water Act works an *unconstitutional* taking of property. *Riverside*, 474 U.S. at 126-129 and nn.4 & 6. But this is no answer to our submission that *Congress did not authorize* regulation of lands like those involved here. If our point is sound, the Corps simply has no jurisdiction to grant or withhold a permit and no taking can occur.

Needless to say, the practical consequences of invalidating the Corps' extension of regulation to a site are very different from the result if only "taking" damages are available. Even for the landowner who is immediately intending to develop his property for subsequent sale, substantial delay and expense is involved when he is relegated to the Claims Court for money compensation. But far worse is the present situation of all those owners who may wish themselves to use the erroneously regulated site, or who may wish to sell it unimproved. In the first hypothesis, the owner, wrongly barred from enjoying his land, ought not be compelled to accept money instead. And, in the other case, the owner may well be without remedy, since he is not seeking a permit and, on the other hand, will find it difficult to sell what is effectively a lawsuit.

B. The Decision Below Is Plainly Erroneous

Notwithstanding the casual assumption to the contrary indulged by the majority below, we deem it plain that the Clean Water Act reasonably cannot be read to reach non-navigable isolated waters whose only connection with interstate commerce is the presence of protected wildlife. This is not to say that Congress has been indifferent to the fate of migratory birds or endangered species. On the contrary, special protective legislation has been enacted, typically providing for the preservation of habitat by authorizing the *purchase* of relevant sites or appropriate easements. See *North Dakota v. United States*, 460 U.S. 300 (1983).[11] But that simply was not the focus of the Clean Water Act, whose mission, as the statutory title implies, was to attempt to restore the purity of the national waters, not to protect interstate wildfowl or endangered species.[12]

---

[11] Statutes enacted to this end include: Migratory Bird Treaty Act of July 3, 1918, 40 Stat. 755, ch. 128, 16 U.S.C. § 703 *et seq.*; Migratory Bird Conservation Act of Feb. 18, 1929, 45 Stat. 1222, ch. 257, 16 U.S.C. § 715 *et seq.*; Bear River Migratory Bird Refuge Act of Apr. 23, 1928, 45 Stat. 448, ch. 413, 16 U.S.C. § 690 *et seq.*; Cheyenne Bottoms Migratory Bird Refuge Act of June 12, 1930, 46 Stat. 579, ch. 469, 16 U.S.C. § 691 *et seq.*; Migratory Bird Hunting Stamp Act of Mar. 16, 1934, 48 Stat. 451, ch. 71, 16 U.S.C. § 718, *et seq.*; Migratory Waterfowl and Other Wildlife Refuge in California Act of May 18, 1948, 62 Stat. 238, ch. 303, 16 U.S.C. § 695 *et seq.*; Migratory Bird Hunting Stamp Act Amendments of Aug. 1, 1958, Pub.L. 85-585, 72 Stat. 486, 16 U.S.C. § 718 (b) & (c); Wetlands Act of Oct. 4, 1961, Pub. L. 87-383, 75 Stat. 813, 16 U.S.C. § 715k-3 *et seq.*; Endangered Species Act of Dec. 28, 1973, Pub.L. 93-205, 87 Stat. 884, 16 U.S.C. § 1531 *et seq.*; Wetlands Loan Extension Act of February 17, 1976, Pub.L. 94-215, 90 Stat. 189, 16 U.S.C. § 715k-3; and Emergency Wetlands Resources Act of Nov. 10, 1986, Pub.L. 99-645, 100 Stat. 3582, 16 U.S.C. § 3901 *et seq.*

[12] It is true that the impact on wildlife and endangered species must be taken into account by the Corps of Engineers and EPA in deciding whether to grant a permit and where a discharge shall be allowed. Sections 404(b), (c) & (e), 33 U.S.C. § 1344(b), (c) & (c). See also, *e.g.*, 33 C.F.R. §§ 320.4(a), (b)(2)(i), (b)(6)(j)(4), 330.5(b)(3); 40 C.F.R. §§ 230.30, 230.32. But it does not follow that such considera-

This limited objective is reflected in the *activities* regulated by the Clean Water Act. The discharge of "pollutants" (including dredged and fill materials) into covered waters is prohibited. But, as the Corps itself acknowledges, the statute does not attempt to preserve waters or wetlands against alteration or even total destruction by any other means, such as excavation, draining, clearing, flooding or diversion of water source. See U.S. Congress Office of Technology Assessment, *Wetlands, Their Use and Regulation* 10, 11, 69-70, 149, 167-170, 175-176 (1984). Arguably, the Corps' inability to prevent the loss of substantial wetland acreage through presently unregulated activities suggests new legislation, State or federal. See, *e.g.*, National Wetlands Policy Forum, *Protecting America's Wetlands: An Action Agenda* (1988); OTA Report, *supra*, at 15-16. But, as it stands today, the Clean Water Act does not purport to be a wildlife protection statute or a wetland preservation measure.

Stretching the law beyond its original purpose is all the more questionable when isolated sites are sought to be encompassed. In the case of wetlands and other marginal areas adjacent to navigable waters or their tributaries, it may be assumed that Congress authorized their regulation on the ground that pollution or destruction of these "edges" would adversely affect significant waterbodies. No such water quality concerns are implicated, however, when we move further inland to unconnected isolated waters, especially very shallow seasonal ponds. The filling or degradation of such sites may be a blow to wildlife, but it has no impact on the purity of the national water system. Indeed, the Corps' assertion of jurisdiction over isolated tracts of this kind in no way depends upon any such effect, and there is no claim here that development of the property in suit would affect water quality elsewhere, directly or indirectly.

At the threshold, then, grave doubts arise whether the "isolated waters" provision even arguably implements the Clean Water Act, or is a well-meaning, but illegitimate, attempt to preserve inland aquatic sites—more or less seasonally wet—in the service of some wholly separate objective. This first impression is not dissipated but, rather, reinforced when we examine the words of the law more closely and consult its legislative history.

1. The statutory text itself rejects the notion that isolated non-navigable waters are meant to be reached. Section 404 expressly regulates the discharge of dredged or fill material into "*navigable waters*" alone. 33 U.S.C. § 1344(a). To be sure, that expression is later defined to mean "the waters of the United States" (§ 502(7), 33 U.S.C. § 1362(7)), and this Court has commented that this "makes it clear that the term 'navigable' as used in the Act is of limited import." *Riverside*, 474 U.S. at 133. But—as the Court impliedly recognizes—this is far from altogether discarding the notion of navigability as an anchor for the legislation.

In fact, the expression "waters of the United States," or a like term, had been used in legislation for most of a century to denote waters which, if not themselves navigable, were at least immediately connected to waterways useful for interstate or foreign commercial navigation.[13] And, less than a decade before our 1972 enactment, this Court had accepted as self-evident that the statutory expression "streams 'over which Congress has jurisdiction under its authority to regulate commerce' " reaches no further than "tributaries of river systems necessitating supervisory power to preserve or improve downstream navigability or water commerce generally." *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90, 97 (1965).

The somewhat ambiguous definition of navigable waters no doubt authorizes those who administer the law to push back the *boundaries* of covered navigable waterways to include their non-navigable portions, their non-navigable tributaries, even their adjacent non-navigable wetlands. It does not allow them to ignore that the definition is of *navigable waters*, a term which simply cannot be stretched to embrace waters and wetlands that have *no connection* to any navigable waterway.

If Congress had meant to throw overboard the concept of navigation as the constitutional premise for the legislation, it knew the formula. As long ago as the Federal Power Act of 1920,

---

[13] *See, e.g.*, Rivers and Harbors Act of 1894, § 5, 33 U.S.C. § 499; Act of Feb. 19, 1895, § 2, 33 U.S.C. § 151; Rivers and Harbors Act of 1899, § 10, 33 U.S.C. § 403; Act of Sept. 15, 1922, 33 U.S.C. § 472; Act of June 22, 1936, § 1, 33 U.S.C. § 701(a).

statutes had been written to reach activities "affecting" interstate or foreign commerce. See Federal Power Act, § 23(b), 16 U.S.C. § 817, construed in *Federal Power Commission v. Union Electric Co., supra,* 381 U.S. at 93-99. Here, instead of asserting jurisdiction over all waters whose degradation would affect interstate commerce, Congress chose to limit itself to regulating discharges "in" "navigable waters," however generously defined. This is not a difference we can overlook. Cf. *Polish National Alliance v. NLRB,* 322 U.S. 643, 647 (1944); *U.S. v. Lexington Mill & E. Co.,* 232 U.S. 399, 410 (1914).

There is, of course, no reason to be surprised that only "federal" waters and their adjuncts are apparently embraced. It was natural enough for federal legislation to concern itself with interstate navigable waterways, leaving local waters to State regulation. Moreover, it may have occurred to some Members that straying far beyond the sway of the federal navigational servitude would expose the Government to claims under the Just Compensation Clause.[14] Presumably, Congress was aware that, constitutionally, it could reach further—albeit at potential cost—but here,

---

[14] Perhaps Congress was ready to exercise federal power to the boundary within which no substantial "taking" costs would be incurred, but no further. It must be remembered that the Clean Water Act was passed in 1972, before this Court declared that the navigational servitude creates no blanket exception to the Takings Clause. *Kaiser Aetna v. United States,* 444 U.S. 164, 172 (1979). The general understanding then was that an exercise of the servitude up to the high water line of navigable waterbodies involved no taking of private property. *United States v. Rands,* 389 U.S. 121, 122-123 (1967); *United States v. Kansas City Life Ins. Co.,* 339 U.S. 799, 808 (1950); *Kaiser Aetna, supra,* 444 U.S. at 184-190 (Blackmun, J., dissenting). And, indeed, with only very rare exceptions, this seems to be law again. See *United States v. Cherokee Nation of Okla.,* 480 U.S. 700, 703-707 (1987).

It is worth stressing that the present suggestion is *not* the argument rejected by the Court in *Riverside, supra,* 474 U.S. at 126-129. There the Court of Appeals had given the Clean Water Act a narrow reading to avoid the supposed problem of *unconstitutional* "takings," which was answered, inter alia, by presuming that just compensation would be available under the Tucker Act if a taking occurred. 474 U.S. at 127-129. We here make the different point that *cost* and *comity,* rather than

as elsewhere, there was no obligation to go to the constitutional limit. Cf. *Chemehuevi Tribe of Indians v. Federal Power Commission*, 420 U.S. 395, 400 (1975).

The fact is that the Clean Water Act on its face deals only with the waters whose pollution is federal business because they are closely related to interstate commerce. As in earlier legislation,[15] adjacent waters, including non-navigable tributaries and abutting wetlands, are included. But there is no ground for reading "waters of the United States" to encompass non-navigable waters or wetlands wholly isolated from interstate waterbodies, whose deterioration would not affect the federal water system.

2. Far from contradicting the indications of the text, the legislative history of the Clean Water Act fully confirms that navigability was the touchstone of coverage. It is true enough that Congress intended to define the covered waters "broadly," going beyond the "classical" or "traditional" tests followed under earlier water pollution control legislation. *E.g.*, 118 Cong. Rec. 33757 (1972). But this only meant including the non-navigable "portions" and "tributaries" of actually or potentially navigable watercourses—as the repeated invocation of cases so holding indicates. *E.g.*, 118 Cong. Rec. 33756-33757 (statement of Rep. Dingell); 118 Cong. Rec. 33699 (statement of Senator Muskie).[16] From first to last, the preoccupation was with navigability and the

---

constitutional constraints, may have guided Congress to reach less far than it might have.

[15] *E.g.*, Act of June 29, 1888, § 1, 33 U.S.C. § 441 ("tributary waters" of New York Harbor); Rivers and Harbors Act of 1899, § 13, 33 U.S.C. § 407 ("any tributary of any navigable water"); Pub. L. 85-500, § 104, 33 U.S.C. § 610 ("navigable waters, tributary streams, connecting channels, and other allied waters.") See also *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 707-710 (1899).

[16] The decisions of this Court referred to in the legislative history which were apparently intended to reflect the limits of the Clean Water Act are *Economy Light & Power Co. v. United States*, 256 U.S. 113, 121-123 (1921); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 404-410, 426-427 (1940); and *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523-525 (1941).

ultimate refusal meaningfully to define the term exhibits no more than a fear that any words used might be read too narrowly.

It is quite unreal to suggest that, without saying so, those who struggled so long over the way to define navigability meant to cast aside the concept and reach any waters which could be linked with commerce in wholly different ways. The court below misreads the legislative history of the Clean Water Act in concluding that Congress intended to regulate as far as the Commerce Clause would permit. What was in fact said was something very different: that the phrase "*navigable waters*" was to be given "the broadest possible constitutional interpretation." S. Conf. Rep. 1236, 92nd Cong. 2d Sess. 144 (1972); 118 Cong. Rec. 33699 (1972) (statement of Sen. Muskie); see also, *Leslie Salt Co. v. Froehlke,* 578 F.2d 742, 755 (9th Cir. 1978).

No doubt Congress meant to embrace all waters that could be reached under its Commerce Clause *power to regulate water commerce,* i.e., navigable waters, actual and potential, together with their "adjuncts". But there is not the slightest hint that Congress meant to invoke *other* Commerce Clause powers—unrelated to water commerce—to regulate isolated non-navigable waters. Indeed, it is significant that, in *Riverside,* this Court (unlike the court below) eschewed the easy path to its result—that Congress meant to go to the constitutional limit—and, instead, parsed at some length the legislative history of both the 1972 statute and the 1977 amendments in arriving at the expressly limited conclusion that wetlands immediately adjacent to a fully navigable waterway were within the ambit of section 404. See 474 U.S. at 124, 130-132, 135, 136-138.

At the least, it is obvious that those who wrote the Clean Water Act never contemplated that it could be stretched to include isolated waters on the basis of the presence of migratory birds or endangered species. In all the many thousands of pages of legislative history leading to the enactment of the law in 1972, and its revision in 1977, no one, whether legislator, administrator, State official, environmentalist or other witness, ever suggested such a ground for coverage. (In fact, the idea was not born until Congressional hearings in 1985). Yet, it was hardly a secret that migratory birds used isolated waters and wetlands, perhaps most

notably the prairie potholes of the Plains States. See *North Dakota v. United States, supra,* and the legislation there discussed.

Nor is this a trivial matter that might have passed in silence. The new theory of federal jurisdiction is adventurous, to say the least.[17] It surely would not have been accepted by all Members, without debate, as constitutionally legitimate, or as according appropriate deference to State claims to regulate their own local waters. And, as we have seen, the practical consequences of predicating federal regulation on such a basis are far too large to have provoked no comment.

In sum, the legislative history of the Clean Water Act refutes the claim that isolated non-navigable waters—especially wet areas linked to other states only by migratory species—were ever within the ambit of the legislation. It remains only to show that the contrary result below cannot be justified by resort to the rule of deference to administrative construction.

3. We have sought to show that there is no room for reading into the Clean Water Act a license to regulate non-navigable isolated waters frequented by migratory birds or endangered

---

[17] Accepting that the national dimension of the problem of identifying and protecting endangered species and migratory birds justifies federal legislation, it does not necessarily follow that the Commerce Clause authorizes the regulation of waters that are by definition localized and unconnected to any interstate system, merely because they harbor species whose preservation is deemed a national concern. Indeed, it is noteworthy that the originator of this suggested extension of jurisdiction did not claim that the presence of endangered species itself "affected" commerce, but rather that the species might provoke the "interstate movement of persons, such as scientists, who come . . . to study and observe them." *Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works,* 99th Cong., 1st Sess. 189-190 (1985) (Statement of Richard E. Sanderson, Acting Assistant Administrator, EPA) (hereinafter "*1985 Oversight Hearings*"). But there is no requirement of human movement in the "advice" as published or in the decision below. Nor is there any evidence in this case that out-of-state travellers of any kind were enticed to the litigation site.

species. Such a radical extension of coverage, we submit, is well beyond any reasonable construction of the statute, and, accordingly, cannot be vindicated simply by invoking the deference normally due the administrators' reading of the statute.[18] As it happens, moreover, our view is confirmed by the failure of the implementing agencies—including the usually avant-garde EPA —to "discover" the new basis of jurisdiction until more than thirteen years after the law was enacted. This circumstance makes it especially difficult to indulge any presumption in favor of the administrative construction,[19] and indeed, strongly suggests, not legitimate interpretation, but creative law-making by an agency with no such delegated authority.[20]

As has been said, we are not dealing with a relatively inconsequential detail: predicating Clean Water Act jurisdiction over isolated waters on the presence of migratory birds or endangered species brings tens of millions of acres under regulation for the first time, at least potentially banning all residential, agricultural, commercial or industrial use of the sites. Nor is this a matter that can have escaped the attention not only of the legislators, but also of the administrators for so long. The existence of such wet

---

[18] *Dole v. United Steelworkers of America,* 108 L.Ed.2d 23, 38 (1990); *Sullivan v. Zebley,* 107 L.Ed.2d 967, 978 (1990); *Bowen v. Georgetown University Hospital,* 488 U.S. 204, 207, 212-213 (1988); *ETSI Pipeline Project v. Missouri,* 484 U.S. 495, 516-517 (1988); see *Chevron USA v. NRDC,* 467 U.S. 837, 842-844 (1984).

[19] *Bowen v. Georgetown University Hospital,* 488 U.S. at 211-213. See also Bowen v. American Hospital Ass'n, 476 U.S. 610, 646 n.34 (1986); *Immigration & Naturalization Service v. Cardoza-Fonseca,* 480 U.S. 421, 446 n.30 (1987); *United States v. Leslie Salt Co.,* 350 U.S. 383, 396 (1956).

[20] In its appellate briefs in the *Tabb Lakes* case, discussed in a moment, the United States was at pains to assert—correctly, in our view —that the Clean Water Act grants no quasi-legislative power to the Corps of Engineers which would permit the agency, through "substantive" regulations, to expand the statutory coverage. See *Brief of the United States Appellant* 21-23, and *Reply Brief for the United States* 2, 8-10, in No. 89-2905, 4th Cir., *Tabb Lakes, Ltd., v. United States* (filed April 1989).

"islands"—especially prairie potholes and other isolated freshwater wetlands—and their importance to migratory birds, was well-known, and, as noted, had been the focus of special protective legislation. In this setting, then, it is impossible to pretend that the decision of 1985 to reach these areas under Section 404 of the Clean Water Act was merely the belated revelation of a previously unrecognized truth that had always been a brooding omnipresence in the sky.

Also instructive is how the decision came to be made. The Corps of Engineers itself had initially read the Clean Water Act as embracing no more than those navigable waters and their adjuncts that were subject to the federal navigational servitude.[21] Only under compulsion of a court decree in *NRDC v. Callaway*, 392 F.Supp. 685 (D.D.C. 1975), did the Corps rewrite its regulations to reach any isolated waters. See 1975 Regulations, 40 Fed. Reg. 31320 *et seq.* The new regulations barely survived Congressional scrutiny. See *Riverside*, 474 U.S. at 135-137. But, at all events, there was as yet no suggestion that bird use or the presence of endangered species alone would trigger "isolated waters" jurisdiction. Even EPA had made no such claim.

The novel notion underlying the decision below was born during hearings in 1985 before a Senate Subcommittee, where EPA, followed by the Corps, under obvious pressure, agreed to make the jump. See *1985 Oversight Hearings* at 169-170, 189-190, 212. This is not the hallmark of a change of position that merits deference because it results from the "well-considered" judgment of an expert agency, carefully rethinking the import of the statute during "a detailed and comprehensive process," and altering its view "based on its 'expertise and in light of [its] experience in administering the contested provision.' " Compare *Robertson v. Methow Valley Citizens Council*, 104 L.Ed.2d 351,

---

[21] See *Development of New Regulations by the Corps of Engineers, Implementing section 404 of the Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 94th Cong., 1st Sess. 29 (1975) (hereinafter "*1975 House Hearings*"). See also *id.* at 5, 6, 34.

373-374 (1989); *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

The problem is compounded by the "back-door" procedure followed by EPA and the Corps of Engineers in effectuating the new rule. The proposition that the presence of migratory birds or endangered species henceforth would suffice to bring non-navigable isolated waters or wetlands within the Clean Water Act was not announced as a proposed new regulation or an amendment to existing regulations, but was treated as merely a further illustration of the kind of interstate commerce link that was required under the old "isolated waters" regulation. The Corps first purported to apply the new standard by an unpublished "Memorandum" issued by the national headquarters to the several district offices in November 1985, and this was followed by a comment prefacing the issuance of new regulations in November 1986, advising that the "EPA has clarified" that the requisite link with interstate commerce may also be satisfied by showing that isolated waters "are or would be" used as habitat by migratory birds or endangered species. See 51 Fed. Reg. 41217 (1986). Significantly, however, no advance notice was given and neither EPA nor the Corps has incorporated the additional "examples" in the body of the regulations defining "other waters." See 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 230.3(s)(3).

It is well settled that such an attempt to extend jurisdiction without affording affected property owners and the wider public an opportunity to comment beforehand violates the Administrative Procedure Act, 5 U.S.C. § 553, unless the "advice" properly can be described as a mere "interpretive rule" or a "general statement of policy." 5 U.S.C. § 553(b)(3)(A). That was the issue fought out in *Tabb Lakes, Ltd. v. United States*, 715 F.Supp. 726 (E.D. Va. 1988), in which the Corps asserted jurisdiction over some 38 acres of isolated waters and wetlands apparently on the sole basis that migratory birds made their habitat there. The court held for the landowner, concluding that the new rule was "substantive" and therefore invalid as having been promulgated

without the required notice and opportunity for comment.[22] Although that decision had been affirmed in all respects by the Fourth Circuit Court of Appeals, 885 F.2d 866 (1989) (Table), 20 ELR 20008, the court below chose to ignore the ruling, thereby creating a square conflict. What is more, the United States determined not to seek review of *Tabb Lakes* in this Court, with the consequence that, in the Fourth Circuit, the Corps does not assert Clean Water Act jurisdiction in a situation like that presented here.[23] See App. E, *infra* pp. A-46 to A-49.[24]

---

[22] The court in *Tabb Lakes* was concerned only with an immediately effective internal "Memorandum" or "Guidance Letter" issued in November 1985, supplemented in February 1986, rather than the prefatory commentary to revised regulations published in the Federal Register on November 13, 1986. But this can make no difference, since no greater opportunity for comment before effectiveness was afforded in the latter instance. Indeed, the new extension of jurisdiction was effective in November 1985, and the public announcement of that occurrence a year later cannot cure the fatal procedural defect.

[23] The Government may acquiesce in an adverse decision in one judicial District or Circuit without suffering the penalty of estoppel if it later decides to challenge a like ruling elsewhere in favor of a different party. *United States v. Mendoza*, 464 U.S. 154 (1984). But, needless to say, this special privilege does not prejudice the right of a private litigant adversely affected by the inconsistent stance of the United States to petition for certiorari. Nor does the Government's willingness to administer a national statute differently in some States eliminate the desirability of a uniform interpretation.

[24] The Joint Memorandum of EPA and the Corps of Engineers reproduced in the Appendix hereto recites that the problem will be resolved "as soon as possible" by "an APA rulemaking process." ¶ 2, *infra* p. A-48. But, to date, no notice of such rulemaking has been issued, notwithstanding that the Fourth Circuit's decision in *Tabb Lakes* occurred more than a year ago. It is perhaps not unreasonable to surmise that the relevant agencies are reluctant to open a debate about the legitimacy of extending the Clean Water Act to reach non-navigable isolated waters whose only connection to interstate commerce is the transitory presence of migratory birds—and that this reluctance may persist indefinitely, absent this Court's intervention.

Equally important for our purposes, however, are the "grave doubts" voiced by the *Tabb Lakes* court as to the substantive validity of the attempted jurisdictional expansion, even if properly promulgated. 715 F.Supp. at 729, district court opinion adopted, 20 ELR at 20009. We note that a Judge of the Sixth Circuit has also questioned the propriety of extending coverage on this basis. See *United States v. Larkins*, 852 F.2d 189, 193-194 (1988), (Merritt J., concurring). And, of course, the dissenting Judge here has expressed the same reservations. App. A-14, *infra*.

C. The Issue Is Ripe For Resolution By The Court

The present case, we suggest, affords an appropriate vehicle to answer the important question left open in *Riverside*. The issue has divided the panel below and has provoked concerned comments elsewhere; it urgently calls for definitive resolution here.

To be sure, the decision below is, strictly speaking, interlocutory and, although jurisdiction unquestionably exists, the Court might be inclined to await a final judgment, as a discretionary matter. But, in this instance, the limited remand proceedings cannot eliminate or change the issue presented to this Court. It is common ground that *some* part of the litigation site seasonally ponds rainwater and is frequented by migratory birds. Accordingly, the question whether this is a proper basis for regulation under the Clean Water Act will remain no matter the exact delimitation of the affected area. On the other hand, if we are correct, this Court's disposition will entirely avoid the wasteful expenditure of time and money—including judicial time—otherwise consumed in remand proceedings. And, of course, a substantial delay in the final resolution of the question will impose a heavy burden on many landowners throughout the country.

We need hardly add that this is not a case like the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), in which the availability of a Tucker Act remedy in another forum rendered moot the question there tendered to this Court, or like *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), in which the failure to exhaust administrative avenues of relief made premature any considera-

tion of a taking claim. The issue we present is one of statutory authority, which must be decided *before* any "taking" question arises. Indeed, our case is like *Riverside*, where the Court's conclusion that just compensation was due if a taking had occurred avoided the constitutional claim, but not the statutory submission, which was considered and decided.

In the circumstances, we submit the enormous consequences of the present ruling justify the plea for this Court's intervention now. Cf. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153-154 (1964), and cases there cited. See also, 17 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4036 at 27-33, and cases cited in n.57 (2d ed. 1988.)

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be reversed so far as it vacates the decision of the District Court declaring that the United States Army Corps of Engineers has no jurisdiction under the Clean Water Act or the Rivers and Harbors Act over any portion of the property in suit other than the southern tips of each parcel.

Respectfully submitted,

LOUIS F. CLAIBORNE
EDGAR B. WASHBURN
WASHBURN, BRISCOE & MCCARTHY
A Professional Corporation
Attorneys for Petitioners

NOVEMBER 1990

Appendix A

United States Court of Appeals
For The Ninth Circuit

Leslie Salt Co., a Delaware corporation,
Plaintiff-Appellee,
v.
United States of America, et al.,
Defendants,
and
Save San Francisco Bay Association,
a non-profit California corporation;
National Audubon Society,
a non-profit New York corporation,
Defendant-Intervenors-Appellants.
CA No. 89-15244
DC Nos.:
CV-85-8615-CAL
CV-86-4187-CAL

United States of America,
Plaintiff-Appellant,
v.
Leslie Salt Co., a Delaware corporation; and
Cargill, Inc., a Delaware corporation,
Defendants-Appellees.
CA No. 89-15337
DC Nos.:
CV-85-8615-CAL
CV-86-4187-CAL

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge, presiding
Argued and Submitted November 16, 1989
San Francisco, California
Filed: February 6, 1990

OPINION

Before: Farris, Pregerson, and Rymer, Circuit Judges.

Farris, Circuit Judge:

This is an appeal from a district court decision denying the Army Corps of Engineers jurisdiction under the Clean Water Act, 33 U.S.C. § 1251 et. seq., over a parcel of land near the San Francisco Bay. The Corps had sought to require the landowner to obtain a permit before draining and filling the land, which over many years had acquired some aquatic characteristics. The district court found that because these conditions were artificial and were in part caused by the government, the Corps lacked jurisdiction. We reverse and remand.

BACKGROUND

This dispute revolves around a 153 acre tract of undeveloped land south of San Francisco, called the Newark Coyote Property, owned by Leslie Salt. A road separates the property into two parcels, one of 143 acres ("parcel 143") and one of 10 acres ("parcel 10"). The property abuts the San Francisco National Wildlife Refuge and lies approximately one quarter mile from the Newark Slough, a tidal arm of the San Francisco Bay.

The present condition of the property, or rather its condition in late 1985 through 1986 when the Corps claimed jurisdiction, is the result of many artificial changes to the property over the last 100 years. Originally the property was pastureland. The first change occurred early in this century, when Leslie's predecessors in interest constructed facilities for the manufacture of salt. They excavated pits on the eastern one-third of parcel 143 for depositing calcium chloride, and created large, shallow, water-tight basins on the western two-thirds for crystallizing salt. Salt production on the property effectively stopped in 1959. The calcium chloride pits and the crystallizers remained however, and each year they temporarily filled with water during the winter rainy season.[1] The extent of ponding is limited, but standing water did form on the property and remain long enough for fish to live in the

---

[1] The San Francisco Bay area has a Mediterranean climate, in which rain falls primarily in the winter and spring, followed by a long dry season.

ponds. Plant life, which had been nonexistent due to the high salinity and compaction of the soil, formed in the crystallizers after Leslie plowed the property in 1983 to combat a dust problem.

The property was also substantially affected by construction of a sewer line and public roads on and around the property. This construction created ditches, road beds, and most importantly, culverts which hydrologically connected the property to the Newark Slough. Caltrans, the state highway authority, also breached a levy on the wildlife refuge adjacent to the property and destroyed a tidegate which had prevented the tidal backflow from reaching Leslie's property.

The effect of all this human activity was to foster natural, ecological developments: tidewater reached the edges of Leslie's property and caused the creation of some wetland features on the southern fringes. Migratory birds used the crystallizers and calcium chloride pits as habitat during the winter and spring when they were flooded. In addition, an endangered species, the salt marsh harvest mouse, used the property as habitat.

The controversy over this property arose in late 1985 when Leslie started to dig a feeder ditch and siltation pond on parcel 143 in order to drain the land. The Corps soon became aware of this activity and responded by issuing a cease and desist order pursuant to its authority under Section 404 of the Clean Water Act.[2] In that Act Congress directed the Corps, through the Secretary of the Army, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Corps claimed that Leslie was discharging a pollutant (fill) into waters of the United States in violation of

---

[2] Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a) (1982), provides in pertinent part:

> The Secretary [of the Army] may issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

section 301 of the Act.[3] The Corps also claimed that Leslie's activities were obstructing the navigable waters of the United States in violation of section 10 of the Rivers and Harbors Appropriations Act.[4] The Corps issued a second cease and desist order in early 1987 to stop Leslie from placing fill on parcel 10. The Corps issued that order in response to Leslie's attempts to block a culvert that connected its property to the Newark Slough.

In sum, the Corps claimed jurisdiction over the majority of the property. Leslie challenged that claim of jurisdiction and filed suit; the Corps countersued. The district court found in favor of Leslie on all grounds, holding that the property was not subject to the Corps' jurisdiction. The United States appealed that decision. Save San Francisco Bay Association and the National Audubon Society intervened on behalf of the United States.

The Corps now asserts jurisdiction over the property based on two separate theories which apply to two distinct portions of Leslie's land. First, the Corps argues that most of parcel 10 and the southern tip of parcel 143 are adjacent wetlands that are part of the Corps' Clean Water Act Jurisdiction.[5] To resolve this

---

[3] Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a) (1982), provides in pertinent part:

> Except as in compliance with this section and section[ ] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

The Act defines fill as a pollutant at 33 U.S.C. § 1326(6).

[4] Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1982), provides in pertinent part:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; . . . and it shall not be lawful to excavate or fill . . . any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

[5] The Corps also claims that the southern portions of the property are affected by the ebb and flow of the tide, and thus are subject to the Corps' jurisdiction under the Clean Water Act and the Rivers and

dispute we must first determine whether Congress intended that Clean Water Act jurisdiction should extend to property which government actions helped make aquatic. Because we find that it did, we then look to the Corps' regulations interpreting the Act, to determine whether they allow Corps jurisdiction. The Corps' second theory relates to the former crystallizers and calcium chloride pits. The Corps claims that these features are "other waters," as defined by Corps' regulations, that are subject to its jurisdiction.

STANDARD OF REVIEW

The district court's findings of fact are subject to a clearly erroneous standard of review. Issues of law, as well as mixed questions of fact and law that involve consideration of legal concepts rather than essentially factual inquiries, are reviewable de novo. *United States v. McConney,* 728 F.2d 1195, 1200-02 (9th Cir.), *cert. denied,* 469 U.S. 824 (1984).

When considering the Corps' interpretation of the Clean Water Act we defer to the agency's analysis if it is "reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes,* 474 U.S. 121, 131 (1985); *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837, 844-45 (1984). The agency's interpretation of its own regulations is entitled to greater deference, amounting to a plain error standard. *Montana Power Co. v. EPA,* 608 F.2d 334, 345 (9th Cir. 1979); *Chemical Waste Management, Inc. v. EPA,* 873 F.2d 1477 (D.C. Cir. 1989).

Harbors Act. *See* 33 C.F.R. §§ 328.3(a)(1), 328.4(b)(1) and 329.12(a)(2). *See also United States v. DeFelice,* 641 F.2d 1169, 1175 n.15 (5th Cir. Unit A April 1981) (citing cases). Because we find in favor of the Corps on its wetlands claim, we do not reach this alternate argument.

THE SOUTHERN PORTIONS OF THE PROPERTY

The Corps claims that the southern portions of the property are wetlands within its jurisdiction.[6] The district court denied the Corps jurisdiction for three reasons: (1) the wetland conditions were caused by the government, (2) the conditions were not "normal," as required by 33 C.F.R. § 328.3(b), and (3) the property was not adjacent to waters of the United States, as required by 33 C.F.R. § 328.3(a)(7).

A. Governmentally Caused Inundation

We agree with the district court that Congress intended to create a very broad grant of jurisdiction in the Clean Water Act, extending to any aquatic features within the reach of the commerce clause power. *See Leslie Salt Co. v. Froehlke,* 578 F.2d 742, 755 (9th Cir. 1978) (citing *California v. EPA,* 511 F.2d 963, 964 n.1 (9th Cir. 1975), *rev'd on other grounds,* 426 U.S. 200 (1976)). However, the district court made an exception to this broad Congressional mandate and held that changes to the property *caused* by the government do not create jurisdiction. The court reasoned that a contrary holding would allow the Corps "to expand its own jurisdiction by creating some wetland conditions where none existed before." While this is a valid concern, the facts of this case do not present such a problem.

The district court relied upon *United States v. City of Fort Pierre,* 747 F.2d 464 (8th Cir. 1984). In *Fort Pierre,* the Corps asserted section 404 jurisdiction over a dry slough that had begun to exhibit wetland characteristics as a direct result of the Corps' dredging activity on a nearby river. The Eighth Circuit held that the Corps did not have jurisdiction due to the "peculiar facts and unique circumstances" of that case, in which "the Corps, as an unintended by-product of ordinary river maintenance, inadvertently create[d] a wetland-type ecological system on private property where no such system previously existed." *Id.* at 466,

---

[6] The Corps initially claimed that almost all of the property qualified as a wetland. The United States only appeals the district court's determination as to the southern portions of the property, which the district court found had the physical characteristics of wetlands.

481. The Eighth Circuit recently reaffirmed limiting *Fort Pierre* to these specific facts. *See United States v. Southern Inv. Co.*, 876 F.2d 606, 612 (8th Cir. 1989).

The factual situation in this case differs substantially from that in *Fort Pierre*. Here, the Corps was not directly and solely responsible for flooding Leslie's land: Caltrans constructed the culverts which allowed water to flow onto Leslie's property; Caltrans and the Fish and Wildlife Service breached the levee on the wildlife refuge adjacent to Leslie's property which allowed water to flow up the culverts; Caltrans and the Fish and Wildlife Service failed to place effective floodgates on the culverts; Leslie itself maintained floodgates which unknown third parties propped open. Contrary to the district court's conclusion, the Corps did not itself create the wetland conditions and thereby attempt to expand its own jurisdiction.[7]

The fact the third parties, including the government, are responsible for flooding Leslie's land is irrelevant. The Corps' jurisdiction does not depend on how the property at issue became a water of the United States. Congress intended to regulate local acquatic ecosystems regardless of their origin. *See, e.c., Swanson v. United States,* 789 F.2d 1368 (9th Cir. 1986) (Corps construction of a dam creates waters under Corps jurisdiction); *United States v. Tull,* 769 F.2d 182, 184 (4th Cir. 1985) (federal construction of mosquito-control ditch creates waters under Rivers and Harbors Act jurisdiction), *rev'd on other grounds,* 481 U.S. 412, 414 n.1 (1987); *United States v. DeFelice,* 641 F.2d at 1175 (illegal and unauthorized acts of third parties can create Rivers and Harbors Act jurisdiction), *cert. denied,* 454 U.S. 940 (1981); *Track 12 Inc. v. District Engineer, U.S. Army Corps of Engineers,* 618 F. Supp. 448, 449 (D. Minn. 1985) (state and locality construction of highway and sewage system creates Corps jurisdiction). If the Corps' regulations under Clean Water Act jurisdiction harm a landowner, her appropriate response is to seek damages through inverse condemnation proceedings, not to re-

---

[7] All parties agree that the district court's statement that "the Corps flooded the wildlife refuge and thereby brought tidewater further inland," directly contradicts the record and its own statement of facts.

strict the scope of Corps jurisdiction. *Riverside Bayview Homes*, 474 U.S. at 128.

B. Normal Circumstances

The district court's second rationale for denying Corps jurisdiction over the southern portions of the property was a Corps regulation that defines wetlands as an area that "under normal circumstances" supports wetland vegetation. 33 C.F.R. § 328.3(b). Although the district court found the requisite wetland conditions, it held that "circumstances in those areas are not 'normal,' because the ability to support [wetland] vegetation was caused primarily by the government's flooding of the wildlife refuge across [the road]." The district court's interpretation of the "normalcy" requirement is tainted by its holding excluding governmentally created artificial waters from Corps jurisdiction.

The phrase "under normal circumstances" is meant to exclude those areas which are not aquatic, but experience an "abnormal presence of aquatic vegetation." 42 Fed. Reg. 37128 (1977). According to the district court's findings, the southern fringes of the parcel are aquatic areas. The fact that these wetlands are man-made does not make them "abnormal." Whether the wetlands are artificially or naturally created is irrelevant to this determination.

C. Adjacency

We disagree with the district court's third alternative holding, that this wetland is not adjacent to waters of the United States, as required by 33 C.F.R. § 328.3(a)(7). In reaching this conclusion, the district court again relied on its decision to exclude from consideration any consequences of the backflow through the culverts created by Caltrans and the Fish and Wildlife Service. In the absence of this erroneous holding, the southern portions of the property are adjacent to waters of the United States—the water in the culvert, which is directly connected to the Newark Slough.

THE CRYSTALLIZERS AND PITS

The Corps determined that the former crystallizers and calcium chloride pits qualified as "other waters" that were under

Corps jurisdiction according to 33 C.F.R. § 328.3(a)(3). That section defines "waters of the United States" to include:

> All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce. . . .

The district court held that the crystallizers and pits were not described by this section for two reasons. First, because they are artificial structures and the regulation lists only natural formations. Second, the court concluded that the ponding was too temporary to qualify as other waters. The district court also addressed but did not decide the question of whether the property has a sufficient connection to interstate commerce.

A. Artificial vs. Natural Formations

The district court applied the doctrine of *ejusdem generis*[8] to construe the regulations to exclude artificially created waters. The court noted that all the waters listed as "other waters" in section 328.3(a)(3) were naturally created, and concluded that the artificially created crystallizers and calcium chloride pits could not be covered by that section. The *ejusdem generis* rule of statutory construction is used to illuminate the intent of the drafters; when the rule conflicts with other, clearer indications of intent, its results should be ignored. *See Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597, 601 (1963); *Black's Law Dictionary*, 464 (5th ed. 1979). Reliance on the rule is inappropriate in this case.

---

[8] The "ejusdem generis rule" is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. . . . [The rule does not] apply when the context manifests a contrary intention.

Black's Law Dictionary, 464 (5th ed. 1979). *See also* 2A *Sutherland Statutory Construction* § 47.17 at 103 (4th ed. 1973).

First, the district court's interpretation conflicts with other parts of the Corps' regulations which assert that the Corps generally has jurisdiction over man-made waters under both the Clean Water Act and the Rivers and Harbors Act. *See* 33 C.F.R. §§ 328.5, 329.8. The Corps also defines at least one of the features listed in section 328.3(a)(3) to include artificial waters. *See* 33 C.F.R. § 323.2(b) ("lake" includes "a standing body of open water created by artificially blocking or restricting the flow of a river, stream or tidal area"). In addition, the Corps' comments to the final regulations support the power of the Corps to assert jurisdiction over artificially created waters:

> [W]e generally do not consider the following waters to be "waters of the United States." However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States.
>
> * * *
>
> (c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which *are used* exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
>
> * * *
>
> (e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand or gravel *unless and until the construction or excavation operation is abandoned* and the resulting body of water meets the definitions of waters of the United States (see 33 C.F.R. 328.3(a)).

51 Fed. Reg. 41206, 41217 (1986) (emphasis added). These comments show that the Corps intends to exempt from its jurisdiction only those artificially created waters which are currently being used for commercial purposes, and that even those waters are subject to such jurisdiction on a "case-by-case" basis of review. The crystallizers and calcium chloride pits have not been used for commercial purposes for decades and so are not subject to even this limited exemption. Finally, courts have uniformly included artificially created waters in the Corps' juris-

diction under the Clean Water Act and the Rivers and Harbors Act. *See, e.g., Tull,* 769 F.2d 182 (mosquito-control ditch); *Stoeco Dev. Ltd. v. Dept. of the Army Corps of Eng'rs,* 701 F. Supp. 1075, 1078 (D.N.J. 1988) (artificially created wetland), *appeal dismissed,* 879 F.2d 860 (3rd Cir. 1989); *United States v. Akers,* 651 F. Supp. 320 (E.D.Cal. 1987) (same); *Track 12,* 618 F. Supp. 448 (same); *United States v. Ciampitti,* 583 F. Supp. 483 (D.N.J. 1984) (same), *affirmed,* 772 F.2d 893 (3rd Cir. 1985), *cert. denied,* 475 U.S. 1014 (1986). We reject the district court's interpretation of the regulations as creating a distinction between artificial and natural waters.

B. Temporary Water Formations

The district court also held that the crystallizers and calcium chloride pits were not other waters because they "are in fact dry most of the year." Due to the climate in the Bay Area, ponding only occurs during the winter rainy season. The seasonal nature of the ponding is no obstacle to Corps jurisdiction however, because the regulations specifically enumerate two seasonal water features as other waters: intermittent streams and playa lakes. *See Quivara Mining Co. v. EPA,* 765 F.2d 126, 130 (10th Cir. 1985), *cert. denied,* 474 U.S. 1055 (1986); *United States v. Phelps Dodge Corp.,* 391 F. Supp. 1181, 1187 (D.Ariz. 1975).

The Corps' determination that the crystallizers and calcium chloride pits are similarly seasonal bodies of water within the meaning of the regulations is proper. We reverse the district court's contrary conclusion.

C. Interstate Commerce

The crystallizers and pits must still have sufficient connections to interstate commerce to come under the Corps' jurisdiction as "other waters." 33 C.F.R. § 328.3(a)(3). The Corps has adopted the following EPA criteria to determine when waters have sufficient ties to interstate commerce:

> [Waters]
>
> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross state lines; or

c. Which are or would be used as habitat for endangered species. . . .

51 Fed. Reg. 41206, 41217. The district court failed to determine whether the crystallizers and pits meet these standards. The record showed however, that migratory birds (including many protected by Migratory Bird Treaties) and one endangered species may have used the property as habitat. The commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species. *See Utah v. Marsh,* 740 F.2d 799, 804 (10th Cir. 1984); *Palila v. Hawaii Dep't of Land and Natural Resources,* 471 F. Supp. 985, 991-95 (D.Hi. 1979), *aff'd,* 639 F.2d 495 (9th Cir. 1981). *See generally Hughes v. Oklahoma,* 441 U.S. 322, 329-36 (1979). We remand this issue to the district court to determine if the property has the requisite connections to interstate commerce.

CONCLUSION

The southern portions of Leslie's property meet both the statutory and regulatory requirements for the Corps to exert Clean Water Act jurisdiction over them. The fact that the government in part caused the inundation of the property is not of consequence. Similarly, the government's actions do not affect the normalcy or adjacency requirements of the regulations. As to the crystallizers and calcium chloride pits, their artificiality and temporary wetness pose no obstacle to Corps jurisdiction. We remand to the district court for a factual determination of the sufficiency of the property's connections to interstate commerce. Because the record reflects that the Corps' jurisdiction does not extend to the total property, we also remand to determine over which portion of the property the Corps has valid jurisdiction in light of this opinion's legal conclusions. Costs will abide the final determination.

REVERSED and REMANDED.

RYMER, Circuit Judge, concurring in part, dissenting in part.

I join in the majority's holding that the southern portions of Leslie's property meet the Clean Water Act requirements for Corps' jurisdiction. I disagree, however, with the majority's conclusion that the district court erred in its treatment of the crystallizers and calcium chloride pits.

The crystallizers and pits are seasonal bodies of water that derive their major source of water from rain. There is standing water in the crystallizers and pits during the winter rainy season, when the rain collects, until early to mid-spring, when all the water has evaporated. The rest of the year the crystallizers and pits are dry. Although the majority is correct that "the seasonal nature of the ponding is no obstacle to Corps' jurisdiction," the cycle of ponding in the crystallizers and pits creates no hydrological connection with any other body of water. This fact distinguishes *Quivara Mining Co. v. EPA,* 765 F.2d 126 (10th Cir. 1985) and *United States v. Phelps Dodge,* 391 F.Supp. 1181 (D. Ariz. 1975). Even though three fish may have found their way into one of the ponds, there is nothing in the record to show that water flows directly or indirectly from the crystallizers or pits into another body of water.

That being the case, the district court correctly determined that the crystallizers and pits are not "other waters" within the meaning of section 328.3(a)(3). It is therefore unnecessary to reach the issue on which the Supreme Court has declined to rule, *see United States v. Riverside Bayview Homes,* 474 U.S. 121, 131 n.8 (1985): whether the Clean Water Act extends Corps' jurisdiction to waters that are not "adjacent to bodies of open water."[1]

---

[1] The majority holds that "the commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." Congress does have power under the Commerce Clause to regulate wildlife and endangered species. *Palila v. Hawaii Dep't of Land and Natural Resources,* 471 F.Supp. 985 (D. Haw. 1979), *aff'd* 639 F.2d 495 (9th Cir. 1981) and *Hughes v. Oklahoma,* 441 U.S. 322

(1976) stand for that proposition. However the issue in this case is not whether Congress has the power under the Commerce Clause to regulate wildlife and endangered species, but whether Congress meant to extend Corps' jurisdiction under the Clean Water Act to the full extent of its commerce clause power. Specifically, it is: is it reasonable for Corps' jurisdiction to rest on the fact that migratory birds and endangered species may use the waters as a habitat? In *Utah v. Marsh*, 740 F.2d 799 (10th Cir. 1984), the other opinion on which the majority relies, the lake was used for several purposes that established a connection to interstate commerce. It is unclear whether the *Marsh* court would have found a substantial enough effect on interstate commerce, and thus Corps' jurisdiction under the Clean Water Act, had the only connection to interstate commerce been that "the lake was on flyway of several species of migratory waterfowl . . . ." *Id.* at 803.

In addition, in *Riverside Bayview Homes* the Supreme Court held that since the Corps' asserted jurisdiction over adjacent wetlands was brought to the attention of Congress "through legislation specifically designed to supplant it" (Congress' consideration of the Clean Water Act of 1977, a major piece of legislation aimed at achieving "interim improvements within the existing framework" of the Clean Water Act, H.R. Rep. No. 95-139 pp 1-2 (1977)), and Congress rejected efforts designed to curb that jurisdiction, that was "at least some evidence of the reasonableness of the [Corps'] construction." 474 U.S. at 137. Such evidence of reasonableness does not exist in this case. The Corps issued new regulations governing its regulatory programs on November 13, 1986 in order to clarify the scope of the Section 404 permit program. The new regulations placed the definition of "waters of the United States" into a new Part 328 of Title 33 of the Code of Federal Regulations. As a further clarification, and as an addition to the old regulations, the new regulations stated that "waters of the United States" also include the following: areas which are "or would be" used as a habitat for migratory birds or endangered species. 33 C.F.R. § 328.3(a)(3). This 1986 addition to, or clarification of, the Corps' regulations was not considered during congressional debates on the Clean Water Act of 1977. Therefore, the evidence of reasonableness that the Supreme Court found regarding the Corps' regulations in *Riverside Bayview Homes* does not apply to the 1986 clarification of those regulations, in particular, the list that includes migratory and endangered species habitats.

Appendix B

Leslie Salt Co., a Delaware corporation,
Plaintiff,

v.

The United States of America: John O. Marsh, et al.,
Defendants.

United States of America,
Plaintiff,

v.

Leslie Salt Co., a Delaware corporation,
Cargill Inc., a Delaware corporation,
Defendants.

Nos. C-85-8615-CAL, C-86-4187-CAL.

United States District Court,
N.D. California.

Sept. 29, 1988.
As Amended Jan. 11, 1989.

OPINION

LEGGE, District Judge.

These cases were tried to the court, sitting without a jury. The cases were then argued and submitted for decision following the completion of briefing. The court has heard and reviewed the testimony of the witnesses, and has reviewed the designated deposition transcripts, the exhibits, the designated discovery responses, the record of the case, and the applicable authorities. This opinion constitutes the court's findings of fact and conclusions of law, as provided in Rule 52(a) of the Federal Rules of Civil Procedure.

I. Parties

Leslie Salt Co., a Delaware corporation, is the plaintiff in C-85-8615 and a defendant in C-86-4187. Cargill Inc., a Delaware

corporation, is the owner of Leslie Salt Co. and is also a defendant in C-86-4187. Those parties will jointly be called "Leslie" in this opinion. The United States of America is the plaintiff in C-86-4187 and the defendant in C-85-8615. The Secretary of the Army, the United States Army Corps of Engineers, and certain officers of the Corps of Engineers are also defendants in C-85-8615. The United States, the Secretary, the Corps and its officers are collectively called the "Corps." The Save San Francisco Bay Association, Inc., and the National Audubon Society were granted leave to intervene as defendants in C-85-8615.

II. Jurisdiction of the Court

There is no dispute between the parties as to the jurisdiction and venue of this court. Jurisdiction is predicated on 28 U.S.C. §§ 1331, 1345, 1346, and 2201-2202, 33 U.S.C. §§ 406 and 1319(b). The property in dispute is located in this district, and venue is proper under 28 U.S.C. §§ 1391(b), 1391(e) and 1402, and 33 U.S.C. § 406 and 1319(b).

These actions arose when the Corps issued a cease and desist order to Leslie pertaining to Leslie's activity on certain property that Leslie owns in the City of Newark, California. The Corps asserted jurisdiction over the property under § 1344 of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and subsequently also asserted jurisdiction under § 403 of the Rivers and Harbors Act, 33 U.S.C. § 401 *et seq.* Leslie filed action C-85-8615 to contest the Corps' jurisdiction over the property. The corps then brought action C-86-4187 to establish its jurisdiction over the property under those two Acts, and claimed that Leslie had violated those Acts in connection with its activities on or connected with the property. The principal, but not the only, question to be resolved is whether the property is a "wetland" within the meaning of the applicable statutes and regulations, and hence is under the jurisdiction of the Corps.

III. Burden of Proof

Before trial the Corps moved for a bifurcation and stay of the action. The motion in essence asked this court to refer the central

issue in this case—whether the property is under the jurisdiction of the Corps—to the Corps for its administrative decision. That decision would have then been reviewable by this court under the Administrative Procedure Act, 5 U.S.C. § 706. The record for that review would have been confined to the Corps' decision and its administative record, and the review would have been under the limited standard of whether the Corps' decision was arbitrary, capricous, [sic] an abuse of discretion, or contrary to law. This court denied that motion and determined that the issues should be tried as plenary actions in this court. *Leslie Salt Co. v. United States,* 660 F.Supp. 183 (N.D.Cal.1987).

At trial, the Corps acknowledged that the burden of proof in this plenary civil trial is the preponderance of the evidence. However, the parties disagree about what must be proved. Leslie contends that it has the burden of showing that the Corps lacks jurisdiction over its property. The Corps contends that Leslie must prove that the Corps' assertion of jurisdiction is arbitrary and capricious.

The basis for the Corps' argument is the well-settled principle that an agency's interpretation of a statute which it administers is generally entitled to substantial deference, as is the agency's interpretation of its own regulations. *Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 566, 100 S.Ct. 790, 797, 63 L.Ed.2d 22 (1980). Under this principle, the court must accept the agency's interpretation so long as it is "reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 131, 106 S.Ct. 455, 461, 88 L.Ed.2d 419 (1985).

The court cannot determine whether the Corps has jurisdiction over Leslie's property with no reference at all to the Corps' interpretation of the applicable statutes and regulations. However, the Corps' interpretation is not entitled to prevail simply because it is not capricious or arbitrary. The issue is whether it "is *reasonable,* in light of the language, policies, and legislative history of the Acts for the Corps to exercise jurisdiction." *Id.* at 131, 106 S.Ct. at 461 (emphasis added).

The standard of reasonableness requires evaluating the evidence in light of the language of the Clean Water Act, the Rivers and Harbors Act, and the applicable regulations under those Acts. That requires consideration of a number of factors, including the degree of the Corps' scientific or technical expertise necessarily drawn upon in reaching its interpretation, the consistency of the interpretation within the Corps, the length of adherence to the interpretation, and the explicitness of the Congressional grant of authority to the Corps. *See Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 910-11 (5th Cir.1983).[1]

This is the standard which this court has followed in this case. The court emphasizes that this reasonableness standard does not affect the parties' evidentiary burdens in proving disputed factual issues. Deference does not require the court to accept the Corps' version of the evidence. And the facts stated in this opinon are found by this court to be facts by a preponderance of the evidence.

IV. The Role of the Court

Underlying the legal and factual issues to be decided in this case is the financial question of what use will be made of the property. It is obviously a valuable piece of commercial property, and Leslie seeks to develop it. By asserting jurisdiction, the Corps seeks to preclude or restrict that development, and in essence to maintain the property in its present undeveloped state.

This case therefore involves a balance between the rights of private property on the one hand, and the interests of the government and the public on the other. The scale for measuring that balance is defined by Congress in the Clean Water Act and the Rivers and Harbors Act.

The role of this court is not to sit as a super-ecologist. That is, it is not the function of this court to decide what *should* be done with the property in the best interests of ecological balance. If

---

[1] If the court determines that the Corps has jurisdiction, certain decisions would then be made by the Corps under its administrative processes.

that were the court's function, this court would probably say that the San Francisco Bay Area has too much development and that more land should be left undeveloped. But that is not the court's function. This court's role is to define what Congress did under the Acts, to define what powers the Corps has been given by Congress and by the regulations, and to apply those definitions to the evidence which the court has heard about the property. In order to restrict or prevent Leslie's right to develop its property, the court must find from the evidence that the property is within the jurisdiction of the Corps under those Acts and regulations. That is the extent of the judicial power in this dispute.

V. The Property

The property is owned by Leslie. It totals one hundred fifty-three acres, divided by a road into two parcels of approximately one hundred forty-three acres and ten acres. Except where there is a reason to distinguish between them, both parcels will be collectively called the "property."

The property is located in the City of Newark, Alameda County, California. It is surrounded on all sides by roads and highways. The one hundred forty-three acre parcel ("parcel 143") is bounded on the north by State Highway 84, on the west by Thornton Avenue, on the south by relocated Jarvis Avenue, and on the east by Jarvis Avenue, with residential subdivisions of the City of Newark lying east across Jarvis Avenue. The ten acre parcel ("parcel 10") is located across relocated Jarvis Avenue to the south of parcel 143 and is bounded by Thornton and Jarvis Avenues.

Across Thornton Avenue to the west of the property is the San Francisco National Wildlife Refuge, situated on land which was previously taken from Leslie by condemnation action of United States. The nearest navigable water is Newark Slough, which is approximately one quarter mile from the southernmost tip of the property, and that point is approximately two miles from San Francisco Bay.

Parcel 143 consists of areas of differing characteristics which are important for purposes of this litigation. Approximately the

eastern one-third of the parcel is pastureland. Located on the pastureland are two pits, which were formerly used by Leslie for the deposit of calcium chloride. The remaining two thirds of parcel 143 constitutes land surface which Leslie previously used as crystallizers for the manufacture of salt. The parcel has also been impacted by the construction of highways, a sewer line and ditches, and by plowing, as discussed below. There are no tributary streams or rivers either on or adjacent to the property. The property has never been inundated by tides. The property is drained of water, and is subject to some backflow, through three culverts which run under Thornton Avenue. One is located at the southernmost tip of parcel 10, and runs under Thornton Avenue to Newark Slough. The second is located near the intersection of Jarvis and Thornton, and runs under Thornton Avenue onto the wildlife refuge. The third is located approximately halfway up Thornton Avenue, and also runs under Thornton Avenue and onto the wildlife refuge.[2]

For purposes of this case, the condition of the property must also include consideration of weather. The San Francisco Bay Area has what is called a Mediterranean climate. That is, rain is not consistent throughout the year, but occurs primarily in the winter months with little or no rainfall during the balance of the year. Since the climate is wet in one season and dry the remainder of the year, the amount of water on the property will vary over the year. As a result, observations and scientific tests on the "wetness" of the land will depend in part on when the observations and tests are made.

VI. History of the Property

The issue in this case is whether the property *is* subject to Corps' jurisdiction. That decision must be made by examining the characteristics of the property as it now is (or more accurately, as it was in 1985 when the Corps asserted jurisdiction) under the

---

[2] This property is not of the same type or location as that discussed in *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978). The property in that case was, in its natural condition, marshland subject to the ebb and flow of the tide. The present property is not marshland. *Id.* at 745.

definitions of the Acts and the regulations. The inquiry is not the condition of the property at some prior time in its history. Nevertheless, some references to the history of the property are appropriate as being probative of its conditions today. Indeed, even the Corps argues that the formation of the soils in the geological history of the property is relevant to a determination of whether those soils are "hydric" today. The court will therefore briefly discuss the history of the property insofar as its general background is probative of the present condition of the property.

The property was originally acquired by Leslie's predecessors in interest in the late 1800s. A certain portion of the property, primarily the eastern one-third of parcel 143, has been used as pasture and grazing land for livestock since that time. In approximately 1919, Leslie's immediate predecessor in interest began to construct facilities on the property for the manufacture of salt. A railroad spur, a salt refining plant and related buildings were erected. Pits were excavated on the eastern one-third of the property for depositing calcium chloride.

The western two-thirds of the property was made into so-called salt crystallizers, which held salt brine during the final stage of the solar salt production process. The crystallizers were constructed on dry land, by excavating large shallow basins, and leveling and compacting the soil on the bottom to create a level and watertight surface. The excavated soil was used to build earthen levees around the crystallizers to form watertight earthen containers. During the years of their use by Leslie, saturated salt brine (which had been produced by Leslie's evaporation ponds located closer to San Francisco Bay) was pumped through the Coyote Hills and into the crystallizers. Then salt then precipitated and settled onto the bottom of the crystallizers. The remaining liquid was drawn off, and the salt was harvested by large mechanical harvesters that ran across the floor of the crystallizers. The salt was then moved by railcars to a refining plant located on the property. After each harvest of the salt, the crystallizers were drained, releveled, and recompacted.

By 1959 the use of the property to manufacture salt became uneconomical. Since 1959 (with the exception of some limited production in 1962 and 1968), no use was made of the crystalliz-

ers, and that portion of the property has remained dry, except when rainwater accumulates during the winter. Ponds temporarily form after rains, because the floor of the crystallizers has remained relatively watertight as a result of their construction and frequent compaction. Before being plowed in 1983, the crystallizers were generally devoid of any vegetation, due to the compaction and the high salinity of the soil resulting from their prior use in the manufacture of salt.

A dust problem resulted from the dry and barren condition of the crystallizers. Dust blew from their surface onto the neighboring housing tracts across Jarvis road. As a result, Leslie was cited for air pollution violations. In an attempt to control the dust problem, Leslie plowed the property in 1983 and 1985. The plowing had the obvious result of loosening the soil in the crystallizers and creating furrows. That loosening of the soil and creation of furrows resulted in conditions somewhat more hospitable to the growth of plants.

Two other acts of man affect the present character of the property. In the early 1980s, the Eastbay Dischargers Authority constructed a large sewer line across the property. The construction had the effect of disturbing the natural conditions and left fill and inundations on the property. Between 1980 and 1983, Caltrans constructed Highway 84 across the northern part of the property; relocated Thornton Avenue across the western portion of the property; and relocated Jarvis Avenue, dividing the property into the two parcels. These construction activities by Caltrans resulted in the creation of highways, roadbeds, ditches, and drainage facilities, including culverts under Thornton Avenue. The Caltrans construction also breached a levy on the wildlife refuge and destroyed an inflow control that had prevented Newark Slough from flooding the refuge area. The Caltans construction was also apparently responsible for the destruction, or the keeping open, of what had been a tidegate on one of the culverts under Thornton Avenue. Leslie has asked Caltrans to put a floodgate on one of the culverts, but Caltrans has declined because of the controversy over the issues in this case.

That is the present condition of the property. For purposes of this discussion and the Corps' claim of jurisdiction, the property

can be discussed by reference to the following segments: (a) the western two-thirds of parcel 143, which is the former crystallizer area; (b) the eastern one-third of parcel 143, which has primarily been pastureland; (c) the calcium chloride pits dug on that eastern one-third; (d) parcel 10; and (e) the physical characteristics created by the Caltrans and the sewer construction.

What significance is to be given to the fact that certain of the present features were man-made? The Corps takes the position that this fact should be ignored. Leslie argues that the court should not consider the impact of changes that were made to the property by others without Leslie's consent.

The significant man-made changes to the property include the construction by Caltrans discussed above. In addition, the United States extended some of the drainage ditches across the wildlife refuge to Newark Slough, for the purpose of carrying tidewater onto the refuge in order to create a wetland environment there. Despite requests from Leslie, neither the United States nor Caltrans has installed effective tide control mechansims on the culverts or ditches, with the result that some water occasionally reaches the edges of Leslie's property in the culverts and ditches. Leslie has attempted to install floodgates on the ditches, but these mechanisms were either opened or removed by others.

The court agrees generally with the Corps that the impact of human activity is not, in the usual case, relevant to the Corps' jurisdiction under the Clean Water Act. If a water body is a "water of the United States," it does not matter how it came to be so. *See, e.g., United States v. Akers,* 651 F.Supp. 320, 322 (E.D.Cal.1987); *Track 12, Inc. v. District Engineer,* 618 F.Supp. 448, 450 (D.Minn.1985).

The situation in this case, however, is not typical. The reported decisions on the significance of man-made alterations have involved properties that were indisputably "wetlands," or were otherwise "waters of the United States." In addition, those cases did not involve acts of man that were taken without the consent of, and over the protest of, the owner of the property.

In this case, the Corps flooded the wildlife refuge and thereby brought tidewater further inland, reaching the edges of Leslie's

property. Moreover, the Corps and Caltrans have refused to install tide control mechanisms that would prevent water from reaching the property, and the Corps has prevented Leslie from maintaining such devices. The Corps has in essence tried to expand its own jurisdiction by creating some wetland conditions where none existed before.

Such actions by a government agency undermine the balance struck by Congress between regulation and private ownership. This court therefore concludes that the impact of backflow of water over the wildlife refuge and through the culverts and Caltrans drainage ditches should not be considered in determining the Corps' jurisdiction.

This conclusion is consistent with *United States v. City of Fort Pierre,* 747 F.2d 464 (8th Cir.1984). In that case, a dry slough bed began to exhibit wetland characteristics as a result of the Corps' dredging activity on a nearby river. The court held that the effects of the acts of the Corps should be disregarded in determining Clean Water Act jurisdiction, because "[t]o decide otherwise would allow the Corps to enlarge its jurisdiction beyond the scope originally intended by Congress." *Id.* at 467. This court believes that this principle applies in this case.

The government's reliance on *Swanson v. United States,* 789 F.2d 1368 (9th Cir. 1986) in this case is misplaced. In *Swanson,* the Court held that when the Corps constructed a new dam, its jurisdiction was correspondingly extended to the new high water mark. However, in that case, Congress explicitly approved the dam construction. In this case, Congress did not approve the creation of wetland conditions on Leslie's property. The government argues that Congressional approval of the construction of the wildlife refuge authorizes an expansion of Corps' jurisdiction over Leslie's property. However, Congressional approval of a project does not amount to a sanction for all consequences of the project, only those that are part of it. Congress approved a wildlife refuge of a certain dimension; it did not approve a wildlife refuge that was self-expanding. *Swanson* does not stand for the proposition that an agency can expand its own jurisdiction; it merely reinforces the truism that Congress may give, and Congress may take away, the regulatory jurisdiction of agencies.

VII. The Corps' Assertion of Jurisdiction

The events which led the Corps to assert jurisdiction over the property occurred in October 1985. Leslie began digging a feeder ditch and siltation pond on a portion of the former crystallizers. When the Corps became aware of this, a representative of the Corps visited the property and conferred with Leslie. The Corps then issued a telegraphic cease and desist order, and later a letter asserting jurisdiction.

A second event occurred in 1986-87 with respect to parcel 10. Leslie plugged one end of the culvert leading from that parcel to Newark Slough, in order to prevent water from backing up through the culvert and onto the parcel. The Corps objected to that activity and issued a cease and desist order.

Although Leslie contests the Corps' jurisdiction to issue those cease and desist orders, Leslie has not taken any steps in violation of them while this litigation has been pending.

The Corps asserts jurisdiction over the vast majority of the property, under numerous subsections of the Acts and regulations; *see* exhibit 639. The actual extent of its claim of jurisdiction is marked on a map which is exhibit 640. Leslie denies that any of its property is subject to Corps jurisdiction. It admits that certain small portions in the southernmost tip of parcel 10 and in the southwest corner of parcel 143 may exhibit wetland conditions at certain times of the year, and that water occasionally backs up through the culverts and into the Caltrans ditches. However, as stated above, Leslie contends that those conditions should not be considered for purposes of this case, because they resulted from activities of the United States and Caltrans to which Leslie did not consent.

VIII. Rivers and Harbors Act

Has Leslie violated §403 of the Rivers and Harbors Act, 33 U.S.C. § 401, *et seq.* That issue first of all depends upon whether Leslie's property is subject to the jurisdiction of that Act.

Section 403 in essence prohibits the "creation of any obstruction . . . to the navigable capacity of any of the waters of the

United States," and the alteration of the condition or capacity of any "navigable water of the United States." A general definition of the term "navigable waters of the United States" is set forth in 33 C.F.R. § 329.4. And the extent of Corps' jurisdiction under the Act and the regulation has been interpreted in *Leslie Salt Co. v. Froehlke,* 578 F.2d 742 (9th Cir.1978). As interpreted by the Ninth Circuit, the Corps' jurisdiction under that Act extends only to the portions of property that are "covered by the ebb and flow of the tide to the mean high water mark . . . in its unobstructed natural state." *Id.* at 753.

The evidence established, and the Corps concedes, that none of Leslie's property is below the mean high water line, except certain elevations in the culverts under Thornton Avenue and in certain low-level portions of the drainage ditches constructed by Caltrans. However, the court has concluded for the reasons discussed above that the impact of these structures should not be considered in determining the extent of the Corps' jurisdiction over Leslie's property.[3] The court also finds that even if the culverts and ditches were considered, the evidence is not sufficient to establish that Leslie's property is subject to the jurisdiction of the Act as defined in *Leslie v. Froehlke,* above. Therefore, the court finds and concludes that the acts of Leslie did not violate the Rivers and Harbors Act.

IX. Clean Water Act

Congress passed what is now called the Clean Water Act in 1972, and has subsequently made several amendments. 33 U.S.C. § 1251, *et seq.* Congress did so acting under its Commerce Clause powers. It stated that its legislative objective was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Congress' concerns in the Act were obviously with pollution of the nation's *waters*, and not with all forms of pollution throughout the United States.

---

[3] 33 C.F.R. § 329.8(a) should not apply when the artificial condition was created against the owner's consent.

Under the [illegible] certain activities are prohibited or limited. Among those is "the discharge of any pollutant." 33 U.S.C. § 1311. And Congress defined "pollutant" to include the dumping of fill. 33 U.S.C. § 1362(6).

The primary section with which we are concerned in this case is section 404 of the Clean Water Act, 33 U.S.C. § 1344. In subsection (a), Congress gave to the Corps the power to issue permits, and necessarily to deny permits, for the "discharge of dredged or fill material into the navigable waters." Congress defined the term "navigable waters" to mean the "waters of the United States." 33 U.S.C. § 1362(7). Congress did not define the term "waters of the United States."

Congress therefore gave the Corps jurisdiction to regulate the discharge of fill into the "waters of the United States." This circuit has said that the jurisdictional terms of the Act are to be given the broadest possible interpretation under the Commerce Clause of the constitution. *Leslie Salt Co. v. Froehlke,* 578 F.2d at 755. However, the Ninth Circuit has not defined the maximum limits of the Corps' jurisdiction under the Act. *Id.* at 756. And it is obvious from the statute and the definitions of Congress that the Corps' jurisdiction does not extend to dry land; it extends only to that which is properly "waters of the United States."

As stated, neither Congress nor the courts have defined the term "waters of the United States." The Corps has defined that term in its regulations. 33 C.F.R. § 328. The regulation states that its purpose is to define "the term 'waters of the United States' as it applies to the jurisdictional limits of the authority of the Corps of Engineers under the Clean Water Act." 33 C.F.R. § 328.1.[4]

The primary subsection with which we are concerned here is § 328.3, which defines the terms used to describe property subject to the jurisdiction of the Corps. It is necessary to study some of

---

[4] Other regulations of the Corps, including the regulations dealing with the issuance of permits if the Corps has jurisdiction, are contained in 33 C.F.R. §§ 320-330.

this language in detail, and the applicable portions of the regulations are set out below.[5]

---

[5] § 328.3 Definitions.

(a) The term "waters of the United States" means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

. . . .

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

. . . .

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section. . . .

(b) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

. . .

(f) The term "tidal waters" means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

The decisions to be made with respect to the regulations in this case are primarily ones of fact. That is, giving the Act and the regulations the broad interpretation defined by the U.S. Supreme Court and the Ninth circuit, does the evidence establish that the property is or is not within the definition of "waters of the United States?"

Before discussing the evidence and the language, the court notes that there are two conditions that clearly do not invoke the Corps' jurisdiction. First, land does not become a water of the United States just because water collects, ponds, and stands on land for a few days after a rain. Any land subjected to enough temporary rainfall will collect water which stands until it runs off or percolates into the ground. Such temporary collection of rain does not convert the land to a water. Second, land does not become a water of the United States simply because water drains off of the land and ultimately—through ditches, culverts, rivers, sewers, or the like—flows into waters of the United States. If such drainage made land "waters of the United States," then all property located on elevations, no matter how high, above a water of the United States would become "waters of the United States." But drainage off of land is not enough to make it a water of the United States. Not until flowing water becomes a "tributary" is it deemed to be a water of the United States, 33 C.F.R. § 328.3(a)(5), and the Corps does not contend here that the water that drains from Leslie's land is a tributary.

The court turns now to an examination of the evidence and the portions of 33 C.F.R. § 328.3 under which the Corps claims that Leslie's property is a water of the United States.

A. The Ebb and Flow of the Tide

The first is § 328.3(a)(1). That includes "all waters which are subject to the ebb and flow of the tide." 33 C.F.R. § 328.4(b) provides that the tidal waters of the United States extend to the high tide line. The same term is used in section 328.3(d).

It is clear from the evidence that virtually all of the Leslie's land lies above the high tide line. The property has never been inundated by tides. The only portions that are subject to any ebb and flow of the tide are low elevations in the ditches constructed

by Caltrans, and certain small portions at the southernmost tip of the parcel 10 and the southwestern tip of parcel 143. That water gets there by backing up through one of the culverts running from the wildlife refuge under Thornton Avenue.

The Corps concedes that its jurisdiction does not cover drainage ditches that are dug on dry land. Regulation section 328.3(f) defines tidal waters as those that "rise and fall in a predictable and measurable rhythm." The tidal waters end "where the rise and fall of the water surface can no longer be practically measured." Id. The court finds and concludes that the water that does reach Leslie's land is not tidal water. The water comes from the bay, approximately two miles up Newark Slough, over the lands flooded by the United States for the wildlife refuge, and through culverts. The testimony of the government's witness that there might actually be tidal flow onto Leslie's property was not supported by sufficient objective data. And the court finds that any tidal impact cannot be practically measured.

As stated above, the court also believes that the principle stated in *City of Fort Pierre*, 747 F.2d at 467, is applicable here. That is, it is primarily the flooded condition of the wildlife refuge across Thornton Avenue from Leslie's property that results in the flow of water through the culverts under the road. The evidence is clear that the property was not impacted by any inundation until the construction of the culverts. And since the United States created that condition by the flooding and maintenance of the wildlife refuge, it cannot assert jurisdiction as a result of its maintenance of that causal condition.

The court finds and concludes by a preponderance of the evidence that the property is above the high tide line and is not "subject to the ebb and flow of the tide."

B. Isolated Waters or Wetlands

The second subsection under which the Corps asserts that a portion of Leslie's property is a water of the United States is § 328.3(a)(3):

> (3) All other waters such as intrastate lakes, rivers, streams (including intermitent streams), mudflats, sandflats,

> wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

This subsection has come to be called the "isolated" wetlands or waters provision. The general thrust of this subsection is that certain waters or wetlands may be waters of the United States even though they are physically unconnected with other waters of the United States. The jurisdictional nexus for including such isolated waters within federal jurisdiction is stated in the three subsections of (a)(3); that is, some connection with interstate travel or commerce.

To establish that interstate connection here, the Corps relies upon comments made about § 328.3(a)(3) in the Federal Register where the Corps issued the final regulations. 51 Fed.Reg. 41,206, 41,217 (Nov. 13, 1986). The comments state that the Corps adopts the definitions of the Environmental Protection Agency,[6] which includes consideration of the use of the property as habitat by migratory birds and endangered species. There was evidence at trial that the property is occasionally used by migratory birds, and one endangered species of mouse was found at one location on the property. The Corps' witnesses would extend that jurisdiction not only to *actual* use by migratory birds, but also to *potential* use. Leslie contends that Congress did not intend migratory birds or endangered species to be "interstate commerce" under the Clean Water Act, and that even if it did, such

---

[6] And the Environmental Protection Agency's general counsel opinion of November 19, 1985.

an extension of jurisdiction would not be constitutionally permissable.[7] However, this court need not reach those questions.

Before the interstate commerce connections are considered under the three subsections of (a)(3), the property must itself be "other waters" as described in section (a)(3). The Corps contends that the portions of the Leslie property which are such "other waters" are the calcium chloride pits and the former crystallizers during such periods as rainwater collects in them. The listing of "other waters" in section (a)(3) includes "lakes, rivers, streams . . . mud flats, sand flats . . . sloughs, prairie potholes, wet meadows, palaya [sic] lakes, or natural ponds.[8]" Giving those terms their common sense meanings, the court finds that neither the crystallizers nor the calcium chloride pits are "other waters."

Even if the phrase "such as" in front of those terms is interpreted, as it should be, to mean that the list is not exclusive, the definition of "other waters" is still limited to items of the same kind or class as those listed. *See Weyerhaeuser Steamship Co. v. United States*, 372 U.S. 597, 600-01, 83 S.Ct. 926, 928-29, 10 L.Ed.2d 1 (1963); 2A *Sutherland Statutory Construction* § 47.17 at 103 (4th ed. 1973). The items listed are all natural water conditions, and not artificially created structures.

The calcium chloride pits and former crystallizers were dug for use in manufacturing salt. They are not natural water conditions and are in fact dry most of the year. Even if the regulation is interpreted as extending the definition to include artificially created water bodies, the mere ponding of water on otherwise dry land is not enough to convert that land into "other waters."

This conclusion finds support in the Corps' statements concerning the regulations. The comments to the final regulations promulgated in 1986 state, "For clarification it should be noted that we do not consider the following waters to be 'Waters of the

---

[7] The U.S. Supreme Court, in *Riverside Bayview Homes*, 474 U.S. at 131 n. 8, 106 S.Ct. at 462 n. 8, expressly declined to rule on isolated wetlands issues.

[8] "The definition also includes "wetlands," which the court will discuss below under that specific provision of the regulation.

United States.' . . . Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing." 51 Fed.Reg. 41,206, 41,217 (Nov. 13, 1986). The calcium chloride pits and former crystallizers are types of settling basins, and would not, under these comments, be considered "waters of the United States" even if they were still operating and holding quantities of brine. The same conclusion is apparent when, as in recent years, water is no longer being pumped onto the property.

The court therefore finds and concludes that Leslie's properties are not "other waters" under 33 C.F.R. § 328.3(a)(3).

C. Wetlands

The Corps contends that virtually all of Leslie's property is a "water of the United States" because it is a "wetland." The Corps' jurisdiction over wetlands is contained in 33 C.F.R. § 328.3(a)(7). "Wetlands adjacent to waters. . . ." The term "wetlands" is defined in section 328.3(b) as

> those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Most of the evidence at trial focused upon whether Leslie's property meets that definition. Both sides generally agreed that in making that decision, three primary indicators must be examined: (1) the water on the property ("hydrology"), (2) the condition of the soils, and (3) the extent and nature of the plant life. Those evaluations are made more difficult by the fact that the climate has distinct rainy and dry seasons, and the observations will vary depending upon when the indicators are examined.

The various and interrelated subportions of the definition of "wetland" in section 328.3(b), and the evidence pertaining to them, will be discussed below. However, by first looking at that definition as a whole, it is apparent that the primary indicator is

the vegetation. That is, the land must be sufficiently wet for a sufficient duration to support a prevalence of vegetation which is typically adapted for life in saturated soils. Bare land does not meet the definition. And vegetation does not do so unless there is a prevalence of vegetation typically adapted for life in saturated soils.[9]

The first part of the definition requires that the area be "inundated or saturated."[10] It was clear from the testimony that the property as a whole is not inundated or saturated by any tidal or "wash" action. The source of inundation and saturation of this property, if there is any, can only be rain. It was also clear that the property could be called "inundated" only during and for a short time immediately after winter rains.

The term "saturated" is not defined by the statute or the regulations. But the witnesses appeared to agree on its definition; that is, containing water to a point where the soil can hold no more water and oxygen in the soil is shut out.

Experts on both sides conducted extensive tests of the hydrology and of the soils to make a determination as to whether the property is inundated or saturated. Various tests were used in an attempt to measure the hydrology and degree of saturation. The results of each of those tests, and the specific methods and measures used by the experts, need not be discussed in detail. In general, the studies included analyzing the type of soil, the amount of oxygen in the soil, the amount of water in the soil, the color of the soil, and the amount of reduction of other chemicals.

Water has to be present in the vegetation root zone (by whatever number of inches the depth of that zone is measured) in

---

[9] Some comment is appropriate regarding the term "vegetation." The testimony demonstrated that at certain times of the year algae or alginates form on certain areas of the property. However, the witnesses were unanimous in their conclusion that algae is not "vegetation." That term requires a morphological type of structure. And further, algae can form in a wet condition in a matter of a few days.

[10] It makes no difference in this definition whether the inundation or saturation is by surface water or by ground water.

order for the area to be a wetland. The root zone of this property reaches levels of saturation only during the rainy season. After the runoff of each rain, the root zone is not saturated. Those conclusions are true as to the property as a whole. They are also true as to the crystallizers, whether examined before their plowing or after, except that plowing did increase the temporary puddling of rainwater. The Corps' evidence did not establish the existence of saturation in the root zone area.

The Corps also contends that certain soils on the property are "hydric" by reason of their geological definition. That is, geologists use that term in describing certain types of soil. But that definition generally pertained to soils in layers well below the root zone, and to the wetness conditions when those layers were laid down in long-past geological history. Use of the term "hydric soils" does not really assist in a determination of whether the root zone soil meets the requirements of the regulations.

The Corps also argues for application of the principle of capillary rise; that is, water rises by capillary action from the water table up into higher layers of the soils. The court is prepared to accept this principle of physics. But the evidence was that even capillary rise did not necessarily reach the soils in the root zone. And indeed, even areas affected by capillary rise do not necessarily reach a saturated condition.

The court finds from weighing and evaluating all of the evidence, both percipient and expert, that the property is not "inundated or saturated."

After a rain that is heavy or long enough, any soil will become temporarily saturated. But that is not enough for a determination of wetland under the regulations. The regulations go on to state that the saturation must be "at a frequency and duration" sufficient to support a prevalence of vegetation typically adapted for life in saturated soil conditions. 33 C.F.R. § 328.3(b). The court finds from an evaluation of the evidence that there is not such a frequency or duration. As stated, it is simply not enough that rain water collect on property for a few days for that property to become a water of the Untied States.

The next requirement under regulation 328.3(b) is that the inundation or saturation be sufficient to support, and "under normal circumstances" does support, relevant types of vegetation. The U.S. Supreme Court has noted that this excludes upland areas that for some aberrational reason have some wetland-type vegetation. *Riverside Bayview Homes*, 474 U.S. at 130 n. 7, 106 S.Ct. at 461 n. 7. The Corps acknowledges that its jurisdiction should not extend to "abnormal" conditions, but should pertain to truly aquatic areas; see exhibits 205, 209, 574. The evidence of the "normal circumstances" of the property again focused on the hydrology, the soils, and the vegetation. The evidence included both the present condition of the property and some recent history. And again, the finding of "normal circumstances" is made difficult by the seasonal nature of the rainfall.

It is clear that the eastern one-third of the property, both historically and under present conditions, has been pastureland supporting primarily upland and not wetland vegetation. The area of the crystallizers was not able to support much vegetation of any type, because it had been highly compacted and because its use in the manufacture of salt resulted in very saline soil. This condition was changed somewhat by the plowing of the crystallizers, which made them more hospitable to plant life. However, even since then the plant life has been sparse and has been limited in duration to the rainy season. It is unclear whether the Corps considers the "normal circumstances" to be before or after the plowing. But in either event, the court finds that the salt crystallizer area could not support the relevant types of vegetation under normal circumstances.

Some areas of the crystallizers have been disturbed by the Caltrans construction and by the construction of the sewer line, leaving those areas in an altered condition. The court is willing, as urged by the Corps, to consider those present conditions as "normal" circumstances. Even so considered, the evidence compels the conclusion that during the vast majority of the year there is little or no vegetation on the crystallizer area.

Two areas in the southern corner of parcel 10 and in the southwest corner parcel 143, as well as some of the Caltrans ditches, do support vegetation of the relevant type. But circum-

stances in those areas are not "normal," because the ability to support vegetation was caused primarily by the government's flooding of the wildlife refuge across Thornton Avenue. And those conditions in those very small areas, even if accepted as normal, are not reflective of the normal circumstances of the property as a whole.

The next requirement under regulation 328.3(b) is that the property support a "prevalence of vegetation . . . " There is a difference between the parties as to what the term "prevalence of vegetation" means. Leslie interprets the requirement to mean that in looking at the condition of the ground as a whole, there must be a prevalence of vegetation. On the other hand, the Corps interprets the phrase to mean that if there is *any* vegetation on the land, all that is required is that the prevailing vegetation be of a type which is adapted for life in saturated soil conditions. This court believes that the Corps' interpretation is not reasonable. First, the Corps' position would compel the conclusion that if there were only *one* plant on a large parcel of ground, but if that one plant were adapted for life in saturated soil, then the entire parcel must be a wetland. That position defies the common sense meaning of the word "wetland." Second, the Corps' interpretation is contrary to its own guidance manual on making wetland determinations. The manual requires that *before* determining the issue of the type of vegetation, a finding must first be made that vegetation is the predominate condition of the property. Indeed, in other areas of the United States the Corps does not agree with the interpretation being advanced as to "prevalence of vegetation" in this case. Finally, the Corps' interpretation appears contrary to the definition of wetland in section 328.3(b) read as a whole. When all the sub-clauses of 328.3(b) are read together, it is clear that the predominate condition of the land must be vegetation, and that the vegetation must be plants that can live in saturated soil conditions.

Leslie contends that the prevalence requirement means that fifty percent or more of the site has to be covered by vegetation. This court need not set any exact percentage requirement for prevalence, since it is clear from the evidence in this case that the

prevalence requirement has not been met under any reasonable standard regarding the questioned portions of the property.

The court finds from the evidence that the salt crystallizer areas have not and do not support a prevalence of vegetation. This finding is based upon the testimony describing the property, the historical condition of the property leading up to the "normal" conditions of today, aerial photographs taken over a period of years, and the fields [sic] notes and reports of the experts who examined the area.[11] There was no plant growth in the calcium chloride pits. With respect to the crystallizers, it is clear even from the Corps' evidence that no plant life exists in some areas, and in other areas plants cover only up to one percent of the ground. And many of the plant types identified by the Corps live only during the immediate rainy season and die shortly thereafter. The Corps' witnesses nevertheless testified that those plants were adapted for an annual life cycle that includes dormancy during long dry periods. However, this court questions whether plants that are dead for as much as nine months of the year can meet a "prevalence of vegetation" requirement.

The final clause in the definition of "wetland" requires that the prevalent vegetation be of a type "typically adapted for life in saturated soil conditions." Botanists divide plants into roughly five categories for purposes of determining such adaptation. Those categories define the likelihood of a particular plant being found in saturated soil conditions. They range from those which are found in saturated conditions ninety-nine percent of the time, to those which are not listed and hence are rarely if ever found in saturated soil conditions. Whether a specific plant falls into a particular category may depend upon who is preparing the list. But there is a high degree of consistency in most of the lists.

The court heard extensive evidence on the types of plants found on the property and the nature and characteristics of those plants. On the eastern one-third of the property, the prevalent vegetation

---

[11] At the time of the construction of the freeway, the U.S. Fish & Wildlife Department urged that the highway interchange be put where it is, in the middle of the former crystallizers, because that location for the interchange was one of very low environmental impact.

is upland grasses which are typically not adapted for life in saturated soil conditions. A few plants of a type which are typically adapted to such soil conditions (either highly likely or at least a positive indicator) were found during rainy months in certain of the plowed furrows in the former crystallizers and along the Caltrans ditches. The damper areas on the southernmost tip of parcel 10 and on the southwestern corner parcel 143 also contained such plants.

The court finds from the evidence as a whole that Leslie's property does not contain a prevalence of vegetation which is typically adapted for life in saturated soil conditions.

The court therefore finds from the evidence and from the definition of "wetlands" in 33 C.F.R. § 328.3(b), that the Leslie property is not inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal circumstances it does not support, a prevalence of vegetation typically adapted for life in saturated soil conditions. It is therefore not a "wetland."

For a wetland to be a "water of the United States," there is an additional requirement. The wetland must also be "adjacent to waters" of the United States. 33 C.F.R. § 328.3(a)(7). The term "adjacent" is defined by subparagraph (c) of section 328.3 of that regulation. There was extensive testimony on whether various portions of Leslie's property, if found to be wetlands, were adjacent to waters of the United States. Since the court has concluded the property is not wetland, this adjacency requirement need not be discussed in detail.

Suffice it to say that the Corps' contentions on adjacency were built upon arguments using a jigsaw pattern of various areas of the property which, if deemed to be wetlands, could be "adjacent" to other areas of the property found to be waters of the United States. Most of those contentions have now been resolved against the Corps, because the contested areas were found not to be waters or wetlands.

One of the arguments of the Corps for adjacency is based upon the property that lies west of Thornton Avenue; that is, Newark Slough and the wildlife refuge, which are connected to the Leslie

property by the culverts running under Thornton Avenue. The court finds and concludes that even if portions of Leslie's property were found to be wetlands, the adjacency requirement has not been satisfied. The reason is that the condition which created the alleged wetland—that is, the flooding of the wildlife refuge and the resulting backing of water through the culverts—was contributed to by the United States itself and cannot under *City of Fort Pierre*, 747 F.2d 464, be considered in the adjacent wetlands determination.

The court therefore finds and concludes that the property is not a "water of the United States" as defined in 33 C.F.R. § 328, and hence is not within the jurisdiction of the Corps under the Clean Water Act.

X. Estoppel

Leslie also asserts that the Corps is estopped from asserting jurisdiction over the property. The argument is based upon actions which the Corps either did or did not take at the time of the Caltrans construction, the construction of the sewer, and the condemnation and use of the wildlife refuge. However, since the court has determined that the property is not "waters of the United States," and hence is not subject to the Corps' jurisdiction, the court need not consider this argument. The court is therefore making no findings of fact and expressing no opinion on Leslie's argument of estoppel.

XI. ATTORNEYS FEES

Leslie has requested an award of attorneys fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A). Since Leslie is the prevailing party, that statute requires an award of attorneys fees and expenses to Leslie unless this court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. The "substantially justified" standard requires only that the government's position must have been reasonable in law and fact. *Pierce v. Underwood*, ___ U.S. ___, 108 S.Ct. 2541, 2549-51, 101 L.Ed.2d 490 (1988).

While the court believes that some of the government's evidence and arguments were not reasonable, the court nevertheless concludes that the government's position as a whole was substantially justified and that special circumstances make an award to Leslie unjust. The Corps was motivated by a good faith concern for the objectives of Congress and for the Bay Area ecosystem. It was attempting to act in the public interest. The property has a high commercial value, and the amounts expended in this litigation are a very small percentage of its potential value. The government's evidence, although not meeting the burden of persuasion, does meet the burden of substantial justification for the action as a whole. The court therefore declines to award attorneys fees and expenses to Leslie, although Leslie is of course entitled to recover its costs of suit.

IT IS THEREFORE ORDERED that judgment should be entered as follows:

1. The Corps has no jurisdiction over the subject property under Section 10 of the Rivers and Harbors Act, because the property is not a "navigable water of the United States" within the meaning of the Rivers and Harbors Act or the regulations promulgated under that Act.

2. The Corps has no jurisdiction over the subject property under section 404 of the Clean Water Act, because the property is not a "water of the United States" within the meaning of the Clean Water Act or the regulations promulgated under that Act.

3. Leslie's work on the property did not and does not constitute a violation of the Rivers and Harbors Act or the Clean Water Act, and did not and does not require a permit from the Corps of Engineers.

4. In favor of plaintiff and against defendants and intervenors in action No. C-85-8615.

5. In favor of defendants and against plaintiffs in action No. C-86-4187.

Within fifteen (15) days of this order, Leslie is to submit to the court, and serve on the Corps, a proposed form of judgment that conforms to this opinion.

Appendix C

United States Court of Appeals
For The Ninth Circuit

Leslie Salt Co., a Delaware corporation,
Plaintiff-Appellee,
v.
United States of America, et al.,
Defendants,
and
Save San Francisco Bay Association,
a non-profit California corporation;
National Audubon Society,
a non-profit New York corporation,
Defendant-Intervenors-Appellants.

United States of America,
Plaintiff-Appellant,
v.
Leslie Salt Co., a Delaware corporation; and
Cargill, Inc., a Delaware corporation,
Defendants-Appellees.
CA No. 89-15244
DC Nos.:
CV-85-8615-CAL
CV-86-4187-CAL
(Northern California)
ORDER
CA No. 89-15337
DC Nos.:
CV-85-8615-CAL
CV-86-4187-CAL

Before: FARRIS, PREGERSON, and RYMER, Circuit Judges:

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix D

(Statutory and Regulatory Provisions Involved)

1. Section 301(a) of the Clean Water Act, 33 U.S.C. 1311(a), provides as follows:

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

2. Section 404(a) of the Clean Water Act, 33 U.S.C. 1344(a), in relevant part, provides as follows:

> The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

3. Sections 502(7) and 502(12) of the Clean Water Act, 33 U.S.C. 1362(7) and 1362(12), provide as follows:

> Except as otherwise specifically provided, when used in this chapter:
>
> * * * * *
>
> (7) The term "navigable waters" means the waters of the United States, including the territorial seas.
>
> * * * * *
>
> (12) the term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

4. 33 C.F.R. § 328.3(a)(3) provides as follows:

For the purpose of this regulation these terms are defined as follows:

> (a) The term "waters of the United States" means
>
> * * * * *

(3) all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

5. 51 Fed.Reg. 41217 (Nov. 13, 1986) includes the following comment:

EPA has clarified that waters of the United States at 40* CFR 328.3(a)(3) also include the following waters:

a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross state lines; or

c. Which are or would be used as habitat for endangered species; or

d. Used to irrigate crops sold in interstate commerce.

---

* Presumably should be *33* C.F.R.

Appendix E

Department Of The Army
U.S. Army Corps of Engineers
Washington, D.C. 20314-1000

24 Jan 1990

Reply to
Attention of:

CECW-OR

Memorandum For See Distribution

SUBJECT: Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *Tabb Lakes v. United States*

1. As a result of the Fourth Circuit Court decision in *Tabb Lakes v. United States*, the enclosed Corps of Engineers/Environmental Protection Agency memorandum was developed to provide guidance on the regulation of isolated waters pending completion of rulemaking on this subject.

2. Questions or comments concerning this guidance should be directed to Dr. John Hall (202) 272-0201 or Mr. Lance Wood (202) 272-0035.

FOR THE DIRECTOR OF CIVIL WORKS:

Encl

JOHN P. ELMORE
Chief, Operations, Construction and
Readiness Division
Directorate of Civil Works

1. On September 22, 1989, in an unpublished opinion, the United States Court of Appeals for the Fourth Circuit held that the Corps of Engineers may not rely upon memoranda issued on November 8, 1985, and February 11, 1986, by Brigadier General Kelly, then Deputy Director of Civil Works, to assert jurisdiction over isolated waters under section 404 of the Clean Water Act. *Tabb Lakes v. United States*, (No. 89-2905, 4th Cir.). This memorandum provides direction on the continued assertion of jurisdiction over isolated waters, as required by 33 CFR 328.3(a)(3), in the wake of the *Tabb Lakes* decision.

2. *Tabb Lakes* focused on an EPA and Corps interpretation of the definition of "waters of the United States" including isolated waters, described at 33 CFR 328.3(a)(3), as follows:

> All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce, including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce . . . .

The EPA General Counsel issued guidance on September 12, 1985, interpreting this regulation to include isolated waters which are or could be used as habitat by birds protected by Migratory Bird Treaties, migratory birds which cross state lines, and by endangered species. Brigadier General Kelly adopted this interpretive guidance in the Corps guidance memoranda cited above which were the subject of the *Tabb Lakes* litigation. In *Tabb Lakes*, the Court held that the Corps may not rely on this interpretive guidance in making a jurisdictional determination because the guidance was a substantive rule that should have been, but was not, proposed for public comment prior to its

adoption by the agencies. The United States does not intend to appeal the Fourth Circuit's *Tabb Lakes* decision. Instead, the EPA and the Corps intend to undertake as soon as possible an APA rulemaking process regarding jurisdiction over isolated waters. This memorandum provides guidance on how Corps FOAs and EPA Regional Offices should continue to assert CWA jurisdiction over isolated waters in light of the Court of Appeals decision in *Tabb Lakes,* and pending completion of the rulemaking process.

3. The United States believes that the Fourth Circuit's *Tabb Lakes* decision was incorrect and we reserve the right to re-litigate the legal questions decided in the *Tabb Lakes* case in other circuits. Because this decision is not binding on courts outside of the Fourth Circuit, we will not implement the decision outside the area constituting the Fourth Circuit (i.e., outside the states of South Carolina, North Carolina, Virginia, West Virginia, and Maryland).

4. Within the Fourth Circuit, we will follow the holding of *Tabb Lakes,* which was limited to the proceedural notice-and-comment issue discussed above. Thus, within the Fourth Circuit, we will not rely upon or cite the above-referenced memoranda in making jurisdictional determinations. However, we will continue to assert jurisdiction, as required by the "waters of the United States" regulatory definition, over all waters, the use, degradation or destruction of which could affect interstate or foreign commerce, as is required by our existing regulations adopted through the Administrative Procedure Act rulemaking process. Corps FOAs and EPA Regions will apply this regulatory definition to each site on a case-by-case basis, and will evaluate all available information in a manner consistent with the language of the regulations and the expressed Congressional intention that Clean Water Act jurisdiction be exercised over all waters to the fullest extent legally permissible under the Commerce Clause of the Constitution.

5. The following applies to CWA jurisdiction over all isolated waters within the Fourth Circuit. The definition of "waters of the United States" at 33 CFR 328.3(a)(3) was promulgated through the APA rulemaking process and remains in full force and effect

notwithstanding the *Tabb Lakes* decision. This definition encompasses "isolated" waters, including isolated wetlands, since it specifically cites as examples of jurisdictional waters ". . . prairie potholes, wet meadows, [and] playa lakes . . .", all of which are normally "isolated." We fully intend to implement the *Tabb Lakes* decision within the Fourth Circuit; however, we interpret that decision as allowing the Corps and EPA to continue to assert CWA jurisdiction over isolated waters. Accordingly, we expect Corps FOAs and EPA Regional offices within the Fourth Circuit to continue to regulate isolated waters, including isolated wetlands, as required by existing regulations. Consultation with your Office of Counsel is advisable for doubtful cases.

6. If there are any questions with regards to implementation, Corps Divisions should contact Mr. Lance Wood (CECC-E, (202) 272-0035) or the Chief, Regulatory Branch (CECW-OR, (202) 272-1785). EPA Regions should contact Mr. Steve Neugeboren (Office of General Counsel, (202) 382-7703) or Ms. Suzanne Schwartz (Office of Wetlands Protection, (202) 475-7799).

For the Chief of Engineers:

Date: January 24, 1990

JOHN P. ELMORE
Chief, Operations, Construction,
and Readiness Division
Directorate of Civil Works

For the Environmental
Protection Agency:

Date: January 19, 1990

DAVID G. DAVIS
Director
Office of Wetlands Protection